Supreme Court, U. S.
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APPENDIX

Volume I—pages 1a-322a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-357

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT FILED AUGUST 30, 1978
PROBABLE JURISDICTION NOTED OCTOBER 30, 1978

INDEX
Volume I

	Page
Opinion (Per Curiam) of the Court of Appeals filed June 2, 1978	1a
Judgment of the Court of Appeals filed June 2, 1978	3a
District Court Opinion and Order as to the Board of School Commissioners of Mobile County, et al., filed December 9, 1976	5a
District Court Order and Decree Amending Order and Decree Dated December 9, 1976, filed December 13, 1976	52a
Judgment of the District Court filed January 18, 1977	56a
Relevant Docket Entries in the District Court	62a
Complaint filed June 9, 1975	75a
District Court Order filed November 21, 1975, Dismissing Defendants Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions	80a
Plaintiffs' Motion for Certification of Class filed December 15, 1975	81a
District Court Order on Motion to Dismiss filed December 29, 1975	82a
Preliminary Pretrial Order filed January 13, 1976	85a
District Court Order filed January 19, 1976, Granting Plaintiffs' Motion for Certification of Class	87a
Motion to Add Parties Defendant filed March 1, 1976	88a
Proposed Amended Complaint filed March 8, 1976	90a
Motion for Continuance of Defendants filed July 6, 1976	92a
Motion for Default Judgment of Plaintiffs filed July 12, 1976	95a
Second Motion for Continuance of Defendants filed July 12, 1976	100a

	Page
Answer to Amended Complaint of Defendants filed July 12, 1976	106a
Response to Motion for Default Judgment of Defendants filed July 13, 1976	113a
Preliminary Pretrial Order filed July 20, 1976	118a
Motion to Strike of Plaintiffs filed July 29, 1976	120a
Supplemental Joint Pretrial Document Relevant to Mobile County School Board filed July 30, 1976	125a
District Court Notice of Order dated July 30, 1976, Granting Plaintiffs' Motion to Strike	139a
District Court Order on Pretrial Hearing filed August 9, 1976	140a
Motion to Sever and to Dismiss or Continue of Defendant Board of School Commissioners filed September 2, 1976	144a
District Court Order on Defendant Board of School Commissioners' Motion to Sever and Dismiss or Continue filed September 7, 1976	149a
Notice of Appeal filed February 15, 1977, by Defendants	151a
Notice of Cross-Appeal filed February 28, 1977, by Plaintiffs	152a
Portions of Transcript of Proceedings of September 9-17, 1976, before the District Court:	
Caption and Appearances	154a
Index of District Court Proceedings	156a
Commencement of District Court Proceedings: Colloquy	166a
Testimony of Dr. Cort B. Schlichting	184a
Testimony of Dr. Melton A. McLaurin	191a
Testimony of Mr. Cain J. Kennedy	226a
Testimony of Mr. Gary Cooper	253a
Testimony of Mr. Charles L. Cotrell	278a
Testimony of Mr. Robert Edington	298a

Volume II

	Page
Testimony of Mrs. Lonia M. Gill	323a
Testimony of Mrs. Gerre Koffler	332a
Testimony of Mr. James E. Buskey	347a
Testimony of Mr. Joseph N. Langan	361a
Testimony of Mr. John H. Friend	374a-75a; 388a-95a
Testimony of Mr. Dan Alexander	376a-87a
Testimony of Mr. Meyer Perloff	396a
Testimony of Dr. James Everett Voyles	407a
Closing Argument of Mr. James U. Blacksher	429a
Closing Argument of Mr. Abe Philips	435a
Portions of Plaintiffs' Exhibits Introduced During Proceedings of September 9-17, 1976, Before the District Court:	
No. 2 —Article of Dr. McLaurin on "Mobile Blacks and World War II: The Development of a Political Consciousness"	445a
No. 4 —1976 Mobile Voter Turnout for Selected Wards	457a
No. 5 —1973 Mobile Voter Registration	458a
No. 9 —Excerpts from Dr. Voyles' Thesis: "An Analysis of Voting Patterns In Mobile, Alabama, 1948-1970"	459a
No. 10 —Regression Analysis of Votes Received by Candidate Goode in Democratic School Board Primary, May 29, 1962	504a

		Page
No. 19	—Regression Analysis of Votes in Russell School Board Democratic Primary Runoff, May, 1966	508a
No. 34	—Regression Analysis of Votes Received by Candidate Jacobs in School Board Democratic Primary, June 2, 1970	512a
No. 52	—Regression Analysis of Votes Received by Candidate Gill in School Board Place 1, Democratic Primary Runoff, June, 1974	516a
No. 53	—Summary of Regression Analyses for All Elections Analyzed by Plaintiffs	519a
No. 63	—Excerpts from file "Newspaper Ads"	521a
No. 98	—Analysis of Victory Margins in Selected Races	540a

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 77-1583
Summary Calendar*

LEILA G. BROWN, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

JOHN L. MOORE, et al.,
Defendants,

ROBERT R. WILLIAMS, et al.,
Defendants-Appellants,
Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

(June 2, 1978)

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.

PER CURIAM:

The Board of School Commissioners for the Public Schools of Mobile, Alabama appeals from the district court's determination that the election of school commissioners on an at-large

* Rule 18, 5 Cir. Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

basis unconstitutionally dilutes the votes of black citizens of Mobile. Appellants maintain that the court's order creating five single-member districts should be reversed. Plaintiffs cross appeal from the district court's decision to stagger the election of board members rather than order new elections for all five districts in 1978.

We have reviewed the district court's findings and conclusions. Judge Pittman has applied the proper standards for evaluating plaintiffs' contention that the election of school commissioners on an at-large basis dilutes the votes of black citizens and has carefully and thoroughly analyzed the record in light of these standards. On the basis of our own careful study of the record, we are convinced that the district court's findings are not clearly erroneous and that these findings amply support the conclusion that Mobile's at-large election system unconstitutionally depreciates the value of the black vote. *See* Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978). We further conclude that the order framed by the court below was well within the permissible scope of its equitable discretion. Accordingly, the judgment below is in all respects affirmed. The mandate shall issue forthwith.

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 77-1583
Summary Calendar

D.C. Docket No. CA-75-298-P

LEILA G. BROWN, et al.,
Plaintiffs—Appellees,
Cross—Appellants,

versus

JOHN L. MOORE, et al.,
Defendants,

ROBERT R. WILLIAMS, et al.,
Defendants—Appellants,
Cross—Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 2, 1978

ISSUED AS MANDATE: JUNE 2, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,

Plaintiffs,

v.

JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County, HOWARD E. YEAGER, COY SMITH, G. RAY HAAS, individually and in their official capacity as Mobile County Commissioners; ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, INDIVIDUALLY and in their official capacity as School Commissioners of Mobile County, Alabama,

Defendants.

CIVIL ACTION
No. 75-298-P

OPINION AND ORDER AS TO THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

This is an action brought by Leila G. Brown, and other black plaintiffs representing all Mobile County, Alabama, blacks as a class, claiming the present at-large system of electing county commissioners and school commissioners

abridges the rights of the County's black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States; under the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. Sec. 1973, *et seq.*

The defendants are the Board of School Commissioners of Mobile County (Board or school commissioners), Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, the Mobile County Commissioners, Howard E. Yeager, Coy Smith, G. Bay Haas, and the Probate Judge, John L. Moore, the Court Clerk of Mobile County, John E. Mandeville, and the Sheriff of Mobile County, Thomas J. Purvis, and Mobile County, who are sued individually and in their official capacities.

For purposes of clarity, a separate opinion and order will be rendered in this case against the school commissioners, et al., and the Mobile County Commissioners, et al.[1]

The plaintiffs contend that the at-large election system, in the historical and present context of official and social racism in Alabama and Mobile County, has for all practical purposes denied black citizens equal access to participation in the

[1] Many of the facts and most of the law in the Board of School Commissioners and the County Commissioners are as applicable to one defendant as to the other. There are some facts and points of law which are different, particularly with reference to the law creating the different offices and the unresponsiveness of each. Because of this, separate opinions and orders will be rendered. A similar lawsuit against the Mobile City Commissioners, Civil Action No. 75-297-P, *Wiley L. Bolden, et al.* v. *City of Mobile, et al.*, was tried within weeks of this case. All three cases have been under consideration simultaneously. Many of the facts, and much of the law, in the *City* case and *County* cases are the same. Where the applicable Findings of Fact and Conclusions of Law in the two cases and with reference to the respective defendants, are substantially the same, it will be set out at length rather than referring to one or other of the three opinions and orders.

countywide election of School Commissioners of Mobile County and has substantially diluted their vote.[2]

This court has jurisdiction over the claims grounded on 42 U.S.C. Sec. 1983 against the Board and over the claims grounded on 42 U.S.C. Sec. 1973 and under 28 U.S.C. Secs. 1343(3)-(4) and 2201.

This cause was certified as a class action under Rule 23(b)(2) F.R.C.P., the plaintiff class being all black persons who are now citizens of Mobile County, Alabama.

A claim originally asserted under 42 U.S.C. Sec. 1985(3) was dismissed for failure to state a claim upon which relief can be granted.

The defendants under consideration in this portion of the case are the five school commissioners, the Probate Judge, the Court Clerk of the County, the Sheriff, and Mobile County.

The plaintiffs seek a preliminary and permanent injunction enjoining all defendants and others acting at their direction or in concert with them, of holding, supervising, or certifying the results of any election for the Board under the present at-large election system and ordering the reapportionment of the Board into racially non-discriminatory single-member districts, together with attorneys' fees and costs. (See preliminary pretrial response filed July 30, 1976.)

Plaintiffs claim that to prevail they must prove to this court's satisfaction the existence of the elements probative of voter dilution as set forth by *White* v. *Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom East Carroll Parish School Board* v. *Marshall*, *U.S.* , 96 S. Ct. 1083, 47 L.Ed.2d 296 (1976), contending *Zimmer* is only the adoption of specified criteria by the Fifth Circuit of the *White* dilution requirements.

[2] The plaintiffs also contended in its complaint that the present system of electing the school commissioners "discriminates against the rural interests in the county by submerging their local strength in the countywide urban majority." Plaintiffs did not pursue this aspect of the complaint either in the offering of evidence or final arguments. The court treats this ground as abandoned.

The Board defendants stoutly contest the claim of unconstitutionality of the Board as measured by *White* and *Zimmer.* They claim the plaintiffs have no constitutional right to a politically safe black district and that the mere showing of adverse impact on the plaintiffs' political fortunes will not warrant the relief requested as measured by *White* and *Zimmer.*

They further contend that *Washington* v. *Davis,* U.S. , 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976), erects a barrier since the legislative act forming the multi-member, at-large election of the Board members was without racial intent or purpose. They assert *Washington,* 96 S. Ct. at 2047-49, which was an action alleging due process and equal protection violations, held that in these constitutional actions, in order to obtain relief, proof of *intent* or *purpose* to discriminate by the defendants must be shown. Defendants state, therefore, that since the statute under which the Board members are elected was passed when essentially all blacks were disenfranchised, there could be no intent or purpose to discriminate at the time the statute or the Constitution was adopted. Alternatively, however, defendants contend that if *Washington* does not preclude consideration of the dilution factors of *White* and *Zimmer,* they should still prevail because plaintiffs have not sustained their burden of proof under these and subsequent cases.

Plaintiffs' reply is to the effect that *Washington* did not establish any new constitutional purpose principle and that *White* and *Zimmer* still are applicable. If, however, this court finds *Washington* to require a showing of racial motivation at the time of passage of the 1919 or later statutes, plaintiffs contend they should still prevail, claiming the at-large election system was designed and is utilized with the motive or purpose of diluting the black vote. Plaintiffs claim that the discriminatory intent can be shown under the traditional tort standard.

The defendants further contend that the plaintiffs are not entitled to relief because they do not come before the court with clean hands because the plaintiffs thwarted the efforts of the

Board to procure passage by the State Legislature of a constitutionally sound statute providing for single-member districts.

FINDINGS OF FACT

Mobile County, Alabama, is located in the southwestern part of the State bordered on the south by the Gulf of Mexico, on the west by the State of Mississippi, and a large portion of the county to the east by Mobile Bay. In 1970, the county's population was 317,308 with approximately 32.5% of the residents non-white. (Defendants' Exhibit No. 6, p. 1.)

A 1976 estimate placed the county's population at 337,200 with approximately 32.5% of the population non-white. (Defendants' Exhibit No. 6, p. 1.) Practically all county non-whites are black. The 1970 population of the City of Mobile was 190,026 with approximately 35.4% of the residents black.[3]

The 1970 voter age population, 18 years of age and older, was 64.8% for whites and 55.2% for blacks. (Defendants' Exhibit No. 6, p. 18.) An estimate of the black vote as percentage of the total vote in the 1976 primary elections was 24.4% black of the total vote cast. (Defendants' Exhibit No. 6, p. 24).

Almost two-thirds of the county's population resides in the City of Mobile and a large portion of the other blacks in the county reside in the adjoining municipality of Prichard. Of the 103,238 non-whites in the county, 88,890 live in Mobile and Prichard. Only 12,718 non-whites live outside the incorporated municipalities. (Defendants' Exhibit 6, p. 5). It is obvious that the evidence relating to the City of Mobile elections, and other

[3] The court takes judicial knowledge of its records. A companion case, *Bolden, et al.* v. *City of Mobile,* Civil Action No. 75-297-P, under consideration by the court at the same time this case was under consideration, Defendants' Exhibit No. 12, cited these figures according to the 1970 Federal Census.

evidence relating to voter dilution in the City of Mobile, are relevant in this case.

The Mobile County School System is unique in the State of Alabama. The first public school system in the State of Alabama was organized as the Mobile County System.[4]

The Constitution of 1901 preserved the integrity of this system.[5]

Most of the school systems in the rest of the State have both city and county school systems in the various counties.

The plaintiffs contend that the five member at-large scheme was the result of Act No. 498 passed on September 21, 1939, construed together with Title 52, Sec. 62, *et seq., Code of Alabama* (1958) (1939, etc. Acts), which is derived from the 1927 school code. The defendants contend that these are legislative acts of *general* application and have no applicability to the Mobile County Public School System by virtue of the provisions of Sec. 270 of the Constitution of Alabama of 1901 as interpreted by the Alabama Supreme Court in case law. The defendants contend the present existence of the school system and of the school board is provided by a *local* legislative act passed in 1919, Local Acts 1919, p. 73. In any event, there are five commissioners who run on a place-type ballot and are

[4] See *Board of School Commissioners* v. *Hahn*, 246 Ala. 662, 22 So. 2d 91, 92, 93, for a discussion of the history and continuance of the school system in Mobile and Alabama.

[5] Article XIV, Section 270 of the Constitution of 1901:

> "The provisions of this article and of any act of the legislature passed in pursuance thereof to establish, organize, and maintain a system of public schools throughout the state, shall apply to Mobile County only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation as now authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature; provided, that separate schools for each race shall always be maintained by said school authorities."

elected by an at-large vote of the county. There is no requirement that each commissioner reside in a particular part of the county. The commissioners are elected on a staggered basis every two years for a six year term. The defendants Probate Judge, Circuit Clerk of Mobile County, and Sheriff, or persons appointed in their stead, by the Register in equity serve as the appointing board for election officials (Title 17, Secs. 120-26, *Code of Alabama* (1958) and as the Board of Election supervisors to certify election results. Id. Secs. 139, 139(1), 199, 209, 344).

In *Zimmer, aff'd. sub nom. East Carroll Parish School Board,* ("... but without approval of the constitutional views expressed by the court of appeals."), the Fifth Circuit synthesized the *White* opinion with the Supreme Court's earlier *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S. Ct. 1858, 29 L.Ed.2d 363 (1971) decision, together with its own opinion in *Lipscombe* v. *Jonsson,* 459 F.2d 335 (5th Cir. 1972) and set out certain factors to the considered.

Based on these factors as set out in *Zimmer,* 485 F.2d at 1305, the court makes the following findings with reference to each of the primary and enhancing factors:

LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS.

Mobile County blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965.[6] It has only been since that time that significant dimunition of these discriminatory practices has been made. The overt forms of many of the rights now exercised by all Mobile County citizens were secured through national legislation, federal court orders, and a moral commitment of many dedicated white and

[6] In the companion case, *Bolden* v. *City of Mobile,* the evidence was uncontradicted that in 1946 there were only approximately 255 black registered voters out of more than 19,000 registered voters.

black citizens plus the power generated by the restoration of the right to vote which substantially increased the voting power of the blacks. Public facilities are open to all persons. The pervasive effects of past discrimination still substantially affect political black participation.

There are no formal prohibitions against blacks seeking office in Mobile County.[7] Since the Voting Rights Act of 1965, blacks register and vote without hindrance. The election of the school commissioners is partisan and black and whites participate in both parties. However, the court has a duty to look deeper rather than rely on surface appearance to determine if there is true openness in the process and determine whether the processes "leading to nomination and election [are]. . . equally open to participation by the group in question. . . ." *White,* 412 U.S. at 766. One indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large school board. This is true although the black population level is almost one-third.

In the 1960's and 1970's, there has been general polarization in the white and black voting. The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs. When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.

Since 1962, four black candidates have sought election in the at-large county school board election. Dr. Goode in 1962, Dr. Russell in 1966, Ms. Jacobs in 1970, and Ms. Gill in 1974.

[7] The qualifying fee for candidates for the city commission was found unconstitutional in *Thomas* v. *Mims,* 317 F. Supp. 179 (S.D. Ala. 1970). See also *U.S.* v. *State of Ala.,* 252 F. Supp. 95 (M.D. Ala. 1966) (three judge district court panel) (poll tax declared unconstitutional).

All of these black candidates were well educated and highly respected members of the black community. They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in run-off elections.

Three black candidates entered the race of the Mobile City Commission in 1973. Ollie Lee Taylor, Alfonso Smith, and Lula Albert. They received modest support from the black community and virtually no support from the white community. They were young, inexperienced, and mounted extremely limited campaigns.

Two black candidates sought election to the Alabama State Legislature in an at-large election in 1969. They were Clarence Montgomery and T. C. Bell. Both were well supported from the black community and both lost to white opponents.

Following a three-judge federal court order in 1972[8] in which single-member districts were established and the house and senate seats reapportioned, one senatorial district in Mobile County had an almost equal division between the black and white population. A black and white were in the run-off. The white won by 300 votes. There were no overt acts of racism. Both candidates testified and asserted each appealed to both races. It is interesting to note that the white winner published a simulated newspaper with both candidate's photographs appearing on the front page, one under the other, one white, one black.

One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from the black support and his identification with attempting to meet the particularized needs of the black people of the city. He was

[8] *Sims v. Amos,* 336 F. Supp. 924 (M.D. Ala. 1972).

again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.

In 1969, a black got in a run-off against a white in an at-large legislature race. There was an agreement between various white prospective candidates not to run or place an opponent against the white in the run-off so as not to splinter the white vote. The white won and the black lost.

Practically all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a white. Most of them agreed that racial polarization was the basic reason. The plaintiffs introduced statistical analyses known as "regression analysis" which supported this view. Regression analysis is a professionally accepted method of analyzing data to determine the extent of correlation between dependent and independent variables. In plaintiffs' analyses, the dependent variable was the vote received by the candidates studied. Race and income were the independent variables whose influence on the vote received was measured by the regression. There is little doubt that race has a strong correlation with the vote received by a candidate. These analyses covered every city commission race in 1965, 1969, and 1973, both primary and general election of county commission in 1968 and 1972, and selected school board races in 1962, 1966, 1970, 1972, and 1974. They also covered referendums held to change the form of city government in 1963 and 1973 and a countywide legislative race in 1969. The votes for and against white candidates such as Joe Langan in an at-large city commission race, and Gerre Koffler, at-large county school board commission, who were openly associated with black community interests, showed some of the highest racial polarization of any elections.

Since the 1972 creation of single-member districts, three blacks of the present fourteen member Mobile County delegation have been elected. Their districts are more heavily populated with blacks than whites.

Prichard, an adjoining municipality to Mobile, which in recent years has obtained a black majority population, elected the first black mayor and first black councilman in 1972.

Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life. This fact is shown by the removal of such a barrier, i.e., the disestablishment of the multi-member at-large elections for the state legislature. New single member districts were created with racial compositions that offer blacks a chance of being elected, and they are being elected.

The court finds that the structure of the at-large election of school commissioners combined with strong racial polarization of the county's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process.

UNRESPONSIVENESS OF THE ELECTED SCHOOL COMMISSIONERS OF MOBILE COUNTY TO THE BLACK MINORITY.

The at-large elected county board members have not been responsive to the minorities' needs, who constitute 32.5% of the total population.

The Mobile County School System maintained a dual school system which prolonged segregation until sometime after *Davis* v. *Board of School Commissioners of Mobile County,* Civil Action No. 3003-63-H, was commenced in this court in 1963. The lengthy record in *Davis, supra,* is devastating evidence of the complete unresponsiveness and resistance on the part of the

Board to the particularized needs and aspirations of the black community.

This record (the docket sheet itself comprises some 27 pages. See Plaintiffs' Exhibit No. 99.) is replete with dilatory actions by the Board attempting to forestall the implementation of a desegregated school system. Another judge of this court was put in a position of having to compel the school Board to desegregate the school system against the Board's adamant refusal to respond voluntarily to black community interests and the prevailing law of the land. The record shows that on numerous occasions the court, faced with the complete failure of the Board to cooperate, had the unpleasant task of forcing the Board to carry out its lawful directives.

The Board usually acted only in response to numerous restraining and injunctive orders by the court. This occurred over a period of time covering more than a decade of litigation. The restraining orders were all of the same import, to wit, that the School Board follow the law as required by the Constitution.

> "The defendant, Board of School Commissioners of Mobile County and the other individual defendants . . . , be and they are hereby restrained and *enjoined from requiring and permitting segregation of the races* in any school under their supervision from and after such time as may be necessary to make arrangements for admission of children to such school on a racially nondiscriminatory basis with all deliberate speed, as required by the Supreme Court in *Brown* v. *Board of Education of Topeka*, 1954, 349 U.S. 294, 75 S. Ct. 753, 99 L.Ed. 1083." (Emphasis added.)[9]

> "It is ORDERED, ADJUDGED and DECREED that the *defendants*, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently *enjoined from discriminating* on the basis

[9] Order of July 11, 1963, M.E. No. 15,289.

> of race or color in the operation of the school system. *** [T]hey *shall take affirmative action to disestablish* all school segration and to eliminate the effects of the dual school system." (Emphasis added.)[10]

The utter frustration of the court over the repeated failure of the School Board to make a good faith effort to carry out its duties as to all of the students in the system was well articulated in an order of August 1, 1969 (M.E. No. 25,826), wherein the court stated:

> "With *eight years of litigation* entailing countless days and weeks of hearings in court, it has been clearly established that the Mobile County School *System must* forthwith *be operated in accordance with the law* of the land. What this school system needs is to educate children legally, and not engage in protracted litigation. After all, the children are the ones in whom we should be most interested."
> (Emphasis added.)

On March 16, 1970, this same judge, faced with the failure of the Board to carry out certain orders of this court entered pursuant to directives of the Fifth Circuit following rulings of the Supreme Court of the United States, entered an order which state in pertinent part:

> "The School Board is required to follow the *order* of this court of January 31, 1970, as amended and if the same is *not followed* within three days from this date, a *fine of $1,000 per day* is hereby assessed for each such day, against each member of the Board of School Commissioners."[11] (Emphasis added.)

[10] Order of April 7, 1969, M.E. No. 25,342. See also:

1. M.E. No. 15,555, dated 9/9/63
2. M.E. No. 25,274, dated 3/27/69
3. M.E. No. 26,553, dated 1/28/70
4. M.E. No. 27,705, dated 9/14/70

[11] M.E. No. 26,771, dated 3/16/70.

The Fifth Circuit has, in its numerous orders and opinions,[12] noted with displeasure, the total lack of cooperation exhibited by the Board. In *Davis II* (see n. 12, supra), it was stated:

> "Although it seems to be acknowledged on all hands that a *racially segregated system* is still *maintained,* the Defendants' legal position*** is that Plaintiffs have not set forth a claim entitling them to relief. So far as this record shows, the *Defendant* school authorities have *not* to this day ever *acknowledged* that (a) the present system is constitutionally invalid or (b) that there is any obligation on their part to make any changes at any time." 322F.2d at p. 358. (Emphasis added.)

In *Davis IV* (see n. 12, supra), the court said:

> "... [I]t must also be borne in mind that this school *board ignored for nine years* the requirement clearly stated in Brown that the School authorities have the primary responsibility for

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I. *Davis v. Bd. of School Comm. of Mobile County,* 318 F.2d 63 (1963)
II. *Davis,* 322 F.2d 356 (1963), cert. den. 375 U.S. 894, 84 S. Ct. 170, 11 L.Ed.2d 123; reh. den. 376 U.S. 928, 84 S. Ct. 656, 11 L.Ed.2d 628.
III. *Davis,* 333 F.2d 53 (1964), cert. den. 379 U.S. 844, 85 S. Ct. 85, 13 L.Ed.2d 49.
IV. *Davis,* 364 F.2d 896 (1966)
V. *Davis,* 393 F.2d 690 (1968)
VI. *Davis,* 414 F.2d 609 (1969)
VII. *Singleton v. Jackson Municipal Separate School Distrct.,* 419 F.2d 1211 (1969)
VIII. *Davis,* 422 F.2d 1139 (1970)
IX. *Davis,* 430 F.2d 883 (1970); on remand 430 F.2d 889; aff. in part, rev. in part, 402 U.S. 33, 91 S. Ct. 1289, 28 L.Ed.2d 577
X. *Davis,* 483 F.2d 1017 (1973)
XI. *National Education Ass. v. Board of School Comm. of Mobile County,* 483 F.2d 1022 (1973)
XII. *Davis,* 496 F.2d 1181 (1974)
XIII. *Davis,* 517 F.2d 1044 (1975)
XIV. *Davis,* 526 F.2d 865 (1976)

> solving this constitutional problem." 364 F.2d at 898, n. 1. (Emphasis added.)

In *Davis V* (see n. 12, *supra*), the Fifth Circuit stated, through Judge Thornberry:

> "In the last Mobile case, Judge Tuttle said *there must 'be an end to* the present policy of hiring and assigning teachers according to race by the time the last of the schools are fully desegregated for the school year 1967-68.' 364 F.2d at 904. ... [D]espite the court's decree, it seems apparent that the policy of hiring and *assigning teachers according to race* still exists.*** The reason for the lack of progress is that the board has not yet shouldered the burden." 393 F.2d at 695. (Emphasis added.)

Further evidence is contained in *Davis IX* (see n. 12, *supra*), where, on page 886, it is stated:

> "The Mobile County School *System has* almost *totally failed to comply* with the faculty ratio requirement although ordered to do so by the district court on August 1, 1969." (Emphasis added.)

Further, it was pointed out in note 4 thereof, in discussing desegregation plans:

> "... but the *defendants,* the only parties in possession of current and accurate information, have *offered no help.* This lack of cooperation and generally *unsatisfactory* condition created by defendants, should be terminated at once by the district court." 430 F.2d at p. 888. (Emphasis added.)

There are, to date, many unresolved controversies remaining in *Davis.* There is no doubt that with a more cooperative School Board making a more responsive effort to conform to the law, the process of implementing a constitutionally acceptable unitary school system would have been accomplished faster and without the divisiveness, and lengthy and expensive litigation already experienced.

Today, thirteen years after the filing of the *Davis* case, the Board is operating under "A Comprehensive Plan for a Unitary School System" order of this court issued pursuant to a mandate of the Supreme Court of the United States and of the

Fifth Circuit Court of Appeals. Under these circumstances, the defendants can justly claim little credit for this alleged responsiveness today to black needs.

THERE IS NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS.

There is no clear cut *State* policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole. The lack of State policy therefore must be considered as a neutral factor.

In considering the State policy with specific reference to Mobile, the Mobile County School System was established in 1826, the first provision for a "public" school system in the State.[13] The commissioners were to be elected at-large. In 1854, the first general public school system for the State of Alabama was enacted.[14] Section 2 of Article VI of that Act recognized and maintained the Mobile County School System separate and apart from the school system for the State. This was incorporated in the Constitution of 1875 and the Constitution of 1901, Sec. 270 of Article XIV. The at-large election of the Mobile County School Commissioners has continued to the present time. The manifest policy of Mobile County has been to have at-large or multi-member districting.

PAST RACIAL DISCRIMINATION.

Prior to the Voting Rights Act of 1965, there was effective discrimination which precluded effective participation of blacks in the elective system in the State, including Mobile County.

One of the primary purposes of the 1901 Constitutional Convention of the State of Alabama was to disenfranchise the blacks. The Convention was singularly successful in this

[13] Acts of Alabama, 1825-26, p. 35. This Act provided for not less than thirteen nor more than twenty-five commissioners.

[14] Acts of Alabama, 1853-54, p. 8.

objective. The history of discrimination against blacks' participation, such as the cumulative poll tax, the restrictions and impediments to blacks registering to vote, is well established.

Local discrimination in the city and the county has been established in connection with the lawsuits concerning racial discrimination arising in this court, to wit, *Allen v. City of Mobile,* 331 F. Supp. 1134, (S/D Ala. 1971, aff'd. 466 F.2d 122 (5th Cir. 1972), cert. den. 412 U.S. 909 (1973); *Anderson v. Mobile County Commission,* Civil Action No. 7388-72-H (S/D Ala. 1973); *Sawyer v. City of Mobile,* 208 F. Supp. 548 (S/D Ala. 1961); *Evans v. Mobile City Lines, Inc.,* Civil Action No. 2193-63 (S/D Ala. 1963); and *Cook v. City of Mobile,* Civil Action No. 2634-63 (S/D Ala.). *Preston v. Mandeville,* 479 F.2d 127 (5th Cir. 1973), was a countywide case involving racial discrimination of Mobile's jury selection practices. *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L.Ed. 987 (1944) (white primaries) was applicable to Alabama and some Alabama cases of discrimination are *Davis v. Schnell,* 81 F. Supp. 872 (S/D Ala. 1949), aff'd. 336 U.S. 933, 69 S. Ct. 749, 93 L.Ed. 1093 (1949), ("interpretation" tests for voter registration), *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering of local government), *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) (racial gerrymandering of state government), and *U.S. v. Alabama,* 252 F. Supp. 95 (M/D Ala. 1966) (Alabama poll tax).

The racial polarization existing in the city and county elections has been discussed herein. The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners.

In the 1950's and early sixties, prior to the Voting Rights Act of 1965, only a relatively small percentage of blacks were registered to vote in the county.[15] Since the Voting Rights Act, the blacks have been able to register to vote and become candidates.

[15] In the 1950's and 1960's, the impediments placed in the registration of the blacks to vote were not as aggravated in Mobile County as in some counties. It was not necessary for voter registrars

(footnote continued)

ENHANCING FACTORS.

With reference to the enhancing factors, the court finds as follows:

(1) The countywide election encompasses a large district. Mobile County has an area of 1,240 square miles with a population of 317,308 in 1970 and an estimated population of 337,200 in 1976.

(2) There is a majority vote requirement for the school commissioners in the primaries.

(3) There is no anti-single shot voting provision but the candiates run for positions by place or number.[16]

(4) There is a lack of provision for the at-large candidates to run from a particular geographical sub-district, as well as a lack of residence requirement.

The court concludes that in the aggregate, the at-large election structure as it operates in the countywide election of the school commissioners of Mobile County substantially dilutes the black vote in these elections.

CONCLUSIONS OF LAW

I.

The court addresses itself first to the contention of the defendants that the plaintiffs are not entitled to relief because they do not come before the court with clean hands because they thwarted the efforts of the school commissioners to procure

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(footnote continued)
to be sent to Mobile to enable blacks to register. However, as previously noted, in 1946 only 255 blacks out of over 19,000 voters were registered.

[16] The influence of this enchancing factor is minimal. It is this writer's opinion, born out of 15 years experience in a State judicial office subject to the electoral process, that the public's best interest is served, and it can make more intelligent choices, when candidates run for numbered positions. The choices between candidates are narrowed for the voter and they can be compared head to head.

passage by the State Legislature of a *constitutionally* sound statute pending in the 1976 legislature providing for reapportionment of the Board into five single-member districts. These defendants further contend that the Legislature has demonstrated a willingness to pass a constitutionally sound statute providing for reapportionment of the school board into five single-member districts and that this function should be left to the Legislature.

The complaint in this cause was filed in June of 1975. The State Legislature in the summer months of 1975 passed a *local* act reapportioning the Board membership into five single-member districts which these defendants claim they supported. The Board members were dismissed as parties defendant. Shortly thereafter, these defendants sought a declaratory judgment in the State court as to whether or not the local act was constitutional. The State court declared the act was fatally defective because of the manner in which the act was published.[17]

On March 8, 1976, the plaintiffs sought and received leave to add the Board members as parties defendant by an amended complaint. These defendants were served March 19, 1976.

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[17] Article IV, Sec. 106 of the Constitution of 1901:

"Sec. 106. No special, private, or local law shall be passed on any subject not enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each house of the legislature, and said proof spread upon the journal. The courts shall pronounce void every special, private, or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

They failed to plead. On July 12, the plaintiffs filed a motion for a default judgment. On that date, the Board members filed an answer and responded to the motion for default judgment. The case was set for trial July 19, 1976. It was continued at the request of these defendants.[18] The case was reset for trial September 9, 1976. On September 2, 1976, these defendants filed a motion to sever and to dismiss or continue.[19] On September 9, 1976, these defendants filed a motion to stay pending certification for interlocutory appeal and a motion to stay pending appeal, all of which were denied. Beginning with these defendants' response to motion for default judgment and in connection with other motions herein mentioned, these Board members have contended they were making a good faith effort to get a *constitutionally sound legislative* enactment passed in the 1976 Legislature but the plaintiffs blocked passage of the bill. They sought a continuance until the legislature meets again in 1977 to give that legislature an opportunity to pass a constitutionally sound bill dividing the school board into five single-member districts. Although the language varied in motion to motion and document to document, the thrust of each motion was that single-member districts could be provided for by the legislature. The September 2 motion to sever and dismiss and continue by these defendants used this language:

> "Despite the efforts of these defendants, the bill was not passed into law but was blocked by the negative votes of three members of the Mobile County legislative delegation.",

all of whom were black and within the plaintiff class. On the last page of the motion, this language was used:

> "And the Board of School Commissioners of Mobile County can be reapportioned into five single member districts meeting all *consitutional* standards by the *normal legislative* process. . . ." (Emphasis added.)

The same, or substantially the same language was used in the September 9 motion for a stay pending appeal. In a proposed Findings of Fact and Conclusions of Law prepared by these defendants in pursuance of this court's pretrial order, on the last two pages this language was used:

[18] See "Appendix A."

[19] See n. 18, *supra*, "Appendix A."

> "The Legislature of the State of Alabama has demonstrated its willingness, without intervention by this court, to provide a constitutionally sound system of governance for the Mobile County Public School System. . . ."

and

> ". . . plaintiffs have on at least one occasion blocked the good faith efforts to the defendant School Board to procure passage by the State Legislature of a *constitutionally* sound *statute* providing for reapportionment of the School Board into five single-member districts." (Emphasis added.)

In a trial memorandum of these defendants, page 26, it was stated:

> ". . . it is entirely clear that the legislative remedy is available."

This brief was filed September 2.

The evidence before the court indicated that the black legislators from this county became concerned with whether or not the proposed act pending in the 1976 legislature would be constitutionally sound. During closing arguments in this cause, the provisions of the 1901 Constitution, Sec. 270[20] were discussed. The court directed an inquiry to counsel for these defendants whether or not it was his contention and belief that the at-large system could be constitutionally changed by the bill pending in the 1976 legislature. He answered no because the bill was a *general* bill, citing Alabama Supreme Court authorities, which he contended supported his position. This was the first notice the court had that the legal position of counsel for these defendants was that the single-member district bill as drafted and presented to the 1976 legislature could not be constitutionally enacted. In the post-trial memorandum filed by these defendants September 29, 1976, p. 4, it was stated:

> ". . . and *general* Acts of the Legislature relating to school matters have no applicability to the Mobile County Public School system by virtue of the provisions of § 270 of the Constitution of Alabama of 1901." (Emphasis added.)

[20] See n. 5, *supra*.

These defendants had persistently contended the 1976 bill was the same as the 1975 Act. It was not. According to these defendants now, there is a vital difference. The 1975 Act was a *local* act, the proposed 1976 Act was a *general* act. These developments explode these defendants' contention that the plaintiffs do not come into court with clean hands. Clearly, these defendants were trying to place the shoe on the wrong foot. The court takes judicial notice of the lack of cooperation and dilatory practices of the School Board in the past in the *Birdie Mae Davis* case.

II.

There is a threshold question faced by this court in whether or not *Washington v. Davis,* U.S. , 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976), is dispositive of this case so as to preclude an application of the factors determinative of voter dilution as set forth in *White* and *Zimmer,* aff'd. *sub nom. East Carroll Parish School Board.*

It is the defendants' contention that *Washington* makes it clear that to prevail the plaintiffs must prove that the statute establishing the at-large election was *adopted* with a discriminatory *purpose.* They assert that the present existence of the five member Board and their at-large election on a staggered basis every two years is provided for by a *local* Act enacted in 1919, and at that time the blacks were disenfranchised. If the court accepted the plaintiffs' contention that the 1939, etc. Acts, *general* acts, are the statutes the Board is operating under, it would make no difference because the blacks were effectively disenfranchised at the time of those enactments. Therefore, this court need not determine the Alabama constitutional question, to wit, does it take a *local* act or a constitutional amendment to change the present make-up of the Board and the manner by which they are elected. It is reasoned in either event that the at-large system of electing school commissioners when adopted had no relation to minimizing or diluting the black vote because there was none.

The plaintiffs contend that *Washington did not establish a new Supreme Court purpose* test.

The thrust of the defendants' argument is that if the 1919 statute (or by implication, the 1939, etc. Acts) creating the present Board and their election at-large was neutral on its face *Washington does not* permit this court to consider other evidence or factors and must decide for the school commissioners. It is argued that *Washington* is a benchmark decision requiring this finding in the multi-member at-large school commissioners' election.

The school commissioners contend the board membership and at-large election was provided for by either of these statutes enacted during a period of time when the blacks were substantially disenfranchised in the State of Alabama. One of the primary purposes of the 1901 Constitutional Convention was to disenfranchise the blacks.[21]

The court, therefore, will proceed to examine *Washington* on the proposition that the present school board membership and at-large election was provided for by either the 1919 or 1939, etc. Acts of the Legislatures.

Washington upheld the validity of a written personnel test administered to prospective recruits by the District of Columbia Police Department. It had been alleged the test "excluded a disportionately high number of Negro applicants." *Id.* at 2044. The petitioners claimed the effect of this disportionate exclusion violated their Fifth Amendment due process rights and 42 U.S.C. § 1981. *Id.* at 2044. Evidence indicated that four times as many blacks failed to pass the test as whites. Plaintiffs contended the impact in and of itself was sufficient to justify relief. They made no claim of an intent to discriminate. The District Court found no intentional conduct and refused relief.

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[21] The history of Alabama indicates that there was a populist movement at that time which sought to align the blacks and the poor whites. The Bourbon interest of the State sought to disenfranchise the poor whites, along with the blacks, but were unsuccessful, excepting the cumulative feature of the poll tax. They were singularly successful disenfranchising the blacks. The 1901 Constitution had this provision about the Mobile School system: "... provided, that separate schools for each race shall always be maintained by said school authorities." N. 5, *supra.*

The Circuit Court reversed, relying upon *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971). *Griggs* was a Title VII action (42 U.S.C. § 2000e, *et seq.*) in which the racially discriminatory impact of employment tests resulted in their invalidation by the court.

The Supreme Court in *Washington* reconciled its decision with several previous holdings, distinguished some, and expressly overruled some cases in which there were possible conclusions different from *Washington.*

They made *no reference to the recent pre-Washington* cases of its or appellate courts' voting dilution decisions dealing with at-large or multi-member versus single-member districts, and, in particular, no mention was made of the cardinal case in this area, *White* v. *Regester,* 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed.2d 314, (1973) nor to *Dallas* v. *Reese,* 421 U.S. 477, 95 S. Ct. 1706, 44 L.Ed.2d 312, (1975), and *Chapman* v. *Meier,* 420 U.S. 1, 95 S. Ct. 751, 42 L.Ed.2d 766 (1975), nor to *Zimmer,* which the Court had affirmed only a few months before, nor to *Turner* v. *McKeithen,* 490 F.2d 191 (5th Cir. 1975). No reference was made to *Fortson* v. *Dorsey,* 379 U.S. 433, 85 S. Ct. 498, 13 L.Ed.2d 401 (1965), to *Reynolds,* nor to *Whitcomb. Whitcomb,* 403 U.S. at 143, recognized that in an at-large election scheme, a showing that if in a particular case the system operates to minimize or cancel out the voting strength of racial or political elements, the courts can alter the structure. Had the Supreme Court intended the *Washington* case to have the far reaching consequences contended by defendants, it seems to this court reasonable to conclude that they would have made such an expression.

There are several reasons which may be plausibly advanced as to why the *Washington* Court did not expressly overrule nor discuss these cases. Courts are not prone to attempt to decide every eventuality of a case being decided or its effect on all previous cases. The Court may have desired that there be further development of the case law in the district and circuit courts before commenting on the application of *Washington* to this line of cases. The cases may be distinguishable and reconcilable with the expressions in *Washington.* Or, it may not have been the intention of the *Washington* Court to include these cases within the ambit of its ruling.

Washington spoke with approval of *Wright* v. *Rockefeller,* 376 U.S. 52, 84 S. Ct. 603, 11 L.Ed.2d 512 (1964), reh. den. 376 U.S. 959, 84 S. Ct. 964, 11 L.Ed.2d 977, setting out the "intent to gerrymander" requirement established in *Wright. Washington,* at 2047-48.

Wright was the direct descendant of *Gomillion* v. *Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960). These two cases involved racial gerrymandering of political lines. *Gomillion* dealt with an attempt by the Alabama legislature to exclude most black voters from the municipal limits of Tuskegee so whites could control the election. The court found that the State of Alabama impaired the voting rights of black citizens while cloaking it in the garb of the realignment of political subdivisions and held there was a violation of the Fifteenth Amendment. *Gomillion,* at 345. There was no direct proof of racial discriminatory intent. Justice Stevens in his concurring opinion noted with approval, "... when the disproportion [ate impact] is as dramatic as in *Gomillion* . . . , it really does not matter whether the standard is phrased in terms of *purpose or effect." Washington,* at 2054.[22] (Emphasis added.)

Wright dealt with the issue of congressional redistricting of Manhattan. The plaintiffs alleged racially motivated districting. The congressional lines drawn created four districts. One had a large majority of blacks and Puerto Ricans. The other three had large white majorities. The court held the districts were not unconstitutionally gerrymandered upon the finding that "...

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[22] In *Paige* v. *Gray,* 538 F.2d 1108 (5th Cir. 1976), black citizens of Albany, Georgia, brought an action to invalidate the at-large system of electing city commissioners. At 1110, n.3, the court noted the above quote by Justice Stevens, but in the body of the opinion expressed concern with unlawful motive for discriminatory purpose as required by *Washington.* However, at 1110, the court stated "the validity of Albany's change from a ward to an at-large system can best be handled by applying the multifactor test enunciated in . . . *White* v. *Regester* . . . and *Zimmer* v. *McKeithen." Paige,* at 1111, stated *Zimmer* still "sets the basic standard in this circuit."

the New York legislature was [not] motivated by racial considerations or in fact drew the districts on racial lines." *Wright,* 376 U.S. at 56. This set forth the principle that in gerrymandering cases in order for the plaintiffs to obtain relief they must show racial motivation in the drawing of the district lines.

Washington then quoted with approval from *Keyes* v. *School District No. 1,* 413 U.S. 189, 93 S. Ct. 2686, 37 L.Ed.2d 548 (1973), indicating a distinction or reconciliation of that case with *Washington.* There had not been racial purpose or motivation *ab initio* in *Keyes. Keyes* was a Denver, Colorado, school desegregation case. Denver schools had never been segregated by force of state statute or city ordinance. Nevertheless, the majority found that the *actions* of the School Board during the 1960's were sufficiently indicative of "... [a] purpose or intent to segregate" and a finding of *de jure* segregation was sustained. *Keyes,* at 205, 208. That court held that to find overt racial considerations in the *actions* of government officials is indeed a difficult task.[23]

Washington further commented:

> "... an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington,* 96 S. Ct. at 2049.

The plaintiffs contend that *Washington's* discussion with approval of the *Keyes* case permits the application of the "tort" standard in proving intent. In his concurring opinion, Justice Stevens discussed this point:

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[23] In another Fifth Circuit case it was held that if an official is motivated by such wrongful intent, he or she

> "... will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct... play no small part.'" *U.S.* v. *Texas Ed. Agency,* 532 F.2d 380, 388, (5th Cir. 1976) (Austin II) (school desegregation).

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For *normally the actor is presumed to have intended the natural consequences of his deeds.* This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation." *Washington,* 96 S. Ct. at 2054. (Emphasis added.)

The plaintiffs contend this circuit's use of the tort standard of proving intent squares with the above statements. This circuit for several years has accepted and approved the tort standard as proof of segregatory intent as a part of state action in school desegregation findings. *Morales* v. *Shannon,* 516 F.2d 411, 412-13 (5th Cir. 1975), *cert. den.* 423 U.S. 1034 (1975).

Recently, citing *Morales, supra, Cisneros* v. *Corpus Christi Independent School District,* 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. den.* 413 U.S. 920 (1973), reh. den. 413 U.S. 922 (1973), and *United States* v. *Texas Educational Agency,* 467 F.2d 848 (5th Cir. 1972) (en banc) (Austin I), the Fifth Circuit in *U.S.* v. *Texas Education Agency,* (Austin Independent School District) 532 F.2d 380 (5th Cir. 1976) (Austin II) squarely addressed the meaning of discriminatory intent in the following language:

> "Whatever may have been the originally intended meaning of the test we applied in *Cisneros* and *Austin I* [*U.S.* v. *Texas Education Agency, supra,*] we agree with the intervenors that, after *Keyes,* our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions.
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> • • •
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> "Apart from the need to conform *Cisneros* and *Austin I* to the supervening *Keyes* case, there are other reasons for attributing responsibility to a state official who should reasonably foresee the segregative effects of his actions. First, it is difficult—and often futile—to obtain direct evidence of the official's intentions. .... Hence, courts usually rely on circumstantial evidence to ascertain the decisionmakers' motivation." *Id.* at 388.

This court in its findings of fact has held that when the 1919 statute and the 1939, etc. Acts were enacted, the blacks were disenfranchised and here concludes the statutes on their respective faces were neutral. This is in line with Fifth Circuit opinions, *McGill* v. *Gadsden Co. Commission,* 535 F.2d 277 (5th Cir. 1976), *Wallace* v. *House,* 515 F.2d at 633 (5th Cir. 1975), vacated U.S. , 96 S. Ct. 1721, 48 L.Ed.2d 191 (1976). No. 74-2654 (5th Cir., Sept. 17, 1976), affirmed the District Court and *Taylor* v. *McKeithen,* 499 F.2d 893, 896 (5th Cir. 1974). However, in the larger context, the evidence is clear that one of the primary purposes of the 1901 constitutional convention was to disenfranchise the blacks.

Therefore, the legislature in 1919 and 1939, etc. Acts was acting in a race-proof situation. There can be little doubt as to what the legislature would have done to prevent the blacks from effectively participating in the political process had not the effects of the 1901 constitution prevailed. The 1901 constitution and the subsequent statutory schemes and practices throughout Alabama, until the Voting Rights Act of 1965, effectively disenfranchised most blacks.

A legislature in 1919, little more than 50 years after a bitter and bloody civil war which resulted in the emancipation of the black slaves, or a legislature in 1939, etc., should have reasonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large election system imposed.

Under Alabama law, the legislature is responsible for passing acts modifying the form of city and county governments. Mobile County elects or has an effective electoral voice in the election of eleven members of the House and three senators. The state legislature observes a courtesy rule, that is, if the county delegation unanimously endorses local legislation, the legislature perfunctorily approves all local county legislation. The Mobile County Senate delegation of three members operates under a courtesy rule that any one member can veto

any local legislation. If the Senate delegation unanimously approves the legislation, it will be perfunctorily passed in the State Senate. The county House delegation does not operate on an unanimous rule as in the Senate, but on a majority vote principle, that is, if the majority of the House delegation favors local legislation, it will be placed on the House calendar but will be subject to debate. However, the proposed county legislation will be perfunctorily approved if the Mobile County House delegation unanimously approves it. The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a federal court order.[24] There are now three blacks on the eleven member House legislative delegation. This resulted in passage in the 1975 legislature of a bill doing away with the at-large election of the County Board of School Commissioners and creating five single-member districts. This was promptly attacked by the all-white at-large elected County School Board Commission in the State court. The act was declared unconstitutional.

This natural and foreseeable consequence of the 1919 Act, or the 1939, etc. Acts, black voter dilution, was brought to fruition in a few years, the middle 1960's, and continues to the present. This court sees no reason to distinguish a school desegregation case from a voter discrimination case. It appears to this court that the evidence supports the tort standard as advocated by the plaintiffs. However, this court prefers not to base its decision on this theory. This court deems it desirable to determine if the far-reaching consequences of *Washington* as advanced by the defendants is correct without regard to *Keyes.* This court is unable to accept such a broad holding with such far-reaching consequences.

The case *sub judice* can be reconciled with *Washington.* The *Washington* Court, in Justice White's majority opinion, included the following:

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[24] *Sims* v. *Amos,* 336 F. Supp. 924 (M/D Ala. 1972).

> "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)." *Washington*, 96 S. Ct. at 2048.

To hold that the 1919, or 1939, etc. Acts while facially neutral would defeat rectifying the invidious discrimination on the basis of race which the evidence has shown in this case would fly in the face of this principle.

It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an "unequal application of the law. . . as to show intentional discrimination." *Atkins* v. *Texas*, 325 U.S. 398, 404, 65 S. Ct. 1276, 89 L.Ed. 1692 (1945) and the deliberate systematic denials to people from juries because of their race, *Carter* v. *Jury Commission*, *Cassell* v. *Texas*, *Patton* v. *Mississippi*, cited in *Washington*, at 2047, to a present purpose to dilute the black vote as evidenced in this case. There is a "current" condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes*. *Washington*, at 2048.

More basic and fundamental than any of the above approaches is the factual context of *Washington* and this case. Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination. *Washington's* failure to expressly overrule or comment on *White*, *Dallas*, *Chapman*, *Zimmer*, *Turner*, *Fortson*, *Reynolds*, or *Whitcomb*, leads this court to the conclusion that *Washington* did not overrule those cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination.

III.

In order for this court to grant relief as prayed for by plaintiffs, it must be shown that the political process was not

open equally to the plaintiffs as a result of dilution of voting strength and consequently the members of the class had less opportunity to participate in the political process and elect representatives of their choice. *Chapman*, 420 U.S. at 18, and *Whitcomb*. "Access to the political process and not [the size of the minority] population" is the key determinant in ascertaining whether there has been invidious discrimination so as to afford relief. *White*, 412 U.S. at 766; *Zimmer*, 485 F.2d at 1303.

The idea of a democratic society has since the establishment of this country been only a supposition to many citizens. The Supreme Court vocalized this realization in *Reynolds* where it formulated the "one person-one vote" goal for political elections. The precepts set forth in *Reynolds* are the substructure for the present voter dilution cases, stating that "every citizen has an inalienable right to full and effective participation in the political processes. . . ." *Reynolds*, 377 U.S. at 565. The Judiciary in subsequent cases has recongized that this principle is violated when a particular identifiable racial group is *not* able to fully and effectively participate in the political process because of the system's structure.

Denial of full voting rights range from outright refusal to allow registration, *Smith*, to racial gerrymandering so as to exclude persons from voting in a particular jurisdiction, *Gomillion*, to establishing or maintaining a political system that grants citizens all procedural rights while neutralizing their political strength, *White*. The last arrangement is maintained by the countywide at-large election of school commissioners.

Essentially, dilution cases revolve around the "quality" of respresentation. *Whitcomb*, 403 U.S. at 142. The touchstone for a showing of unconstitutional racial voter dilution is the test enunciated by the Supreme Court in *White*, 412 U.S. at 765: "Whether multi-member districts are "being used invidiously to cancel out or minimize the voting strength of racial groups." In *White*, for slightly different reasons in each county, the Supreme Court found that the multi-member districts in Dallas and

Bexar Counties, Texas, were minimizing black and Mexican-American voting strength.

Attentive consideration of the evidence presented at the trial leads this court to conclude that the present at-large countywide election of school commissioners impermissibly violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process. *White,* 412 U.S. at 766; *Whitcomb,* 403 U.S. at 143. The plaintiffs have discharged the burden of proof as required by *Whitcomb.*

This court reaches its conclusion by collating the evidence produced and the law propounded by the federal appellate courts. The controlling law of this Circuit was enunciated by Judge Gewin in *Zimmer,* which closely parallels *Whitcomb* and *White.*[25] The *Zimmer* court, in an *en banc* hearing, set forth four primary and several "enhancing" factors to be considered when resolving whether there has been impermissible voter dilution. The primary factors are:

> "... a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case [for relief] is made." *Zimmer* at 1305. [footnotes omitted].

The enhancing factors include:

> "a showing of the existence of large districts majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Zimmer* at 1305 [footnotes omitted].

1. **LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIATE SELECTION PROCESS TO BLACKS.**

Any person interested in running for school commissioner is able to do so.

[25] See also *Paige* v. *Gray,* 538 F.2d 1108 (5th Cir. 1976).

The system at first blush appears to be neutral, but consideration of facts beneath the surface demonstrate the *effects* which lead the court to conclude otherwise. No black has ever been elected school commissioner in Mobile County. The evidence indicates that black politicians who have previously been candidates in at-large elections and would run again in the smaller single-member districts, shy away from county at-large elections. One of the principal reasons is the polarizaiton of the white and black vote. The court is concerned with the effect of lack of openness in the electoral system in determining whether the multi-member at-large election system of the school commissioners is invidiously discriminatory.

In *White,* the Supreme Court expressed concern with any type of barrier to effective participation in the political process. *Zimmer,* 485 F.2d at 1305, n. 20, expressed its view in this language: "The standards we enunciate today are applicable whether it is a specific law or custom or practice which causes diminution of a minority voting strength."

There is a lack of openness to blacks in the political process in the school commissioners' election.

2. **UNRESPONSIVENESS OF THE ELECTED SCHOOL COMMISSIONERS TO THE BLACK MINORITY.**

It is the conclusion of the court that the countywide elected shool commissioners as practiced in Mobile County has not, and is not, responsive to blacks on an equal basis with whites; hence there exists racial discrimination. Past school boards have not only acquiesed to segregated folkways, but the County School Board has been in federal court continuously since 1963 to effect meaningful desegregation. *Davis v. Mobile County School Board,* Civil Action No. 3003-63 (S/D Ala.). During the course of this court's continuing jurisdiction in *Davis,* there have been 15 or more appeals to the Fifth Circuit. As hereinbefore set out, the Board has been repeatedly guilty of dilatory practices and it cannot justly claim credit for the

improvement of the school system today since they are operating under a court order and the watchful eye of the court in the implementation of that order.[26]

There has been a lack of responsiveness in employment and the operation of a dual school system. The disestablishment of that system and the establishment of a unitary system has been significantly slow. It is this court's opinion that leadership should be furnished in non-discriminatory hiring and promotion by our government, be it local, state, or federal.[27]

3. **NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS.**

The Alabama legislature has offered little evidence of a preference one way or the other for multi-member or at-large districts in its counties. This court finds state policy regarding multi-member at-large districting as neutral.

4. **PAST RACIAL DISCRIMINATION.**

It is this court's opinion that fair and effective participation under the present electoral system is, because of its structure,

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[26] All members of the school board just prior to the November 1976 election resided in metropolitan Mobile. Four members of the school board presently reside in metropolitan Mobile. There have been orders from this court against the City of Mobile or its departments to desegregate the police department, the golf course, public transportation, the airport, and an order affecting the City and County which attack racial discrimination, to wit, the *Allen, Anderson, Sawyer, Evans,* and *Cooke, supra,* cases.

[27] *Norman R. McLaughlin, etc.* v. *Howard H. Callaway, et al.,* Civil Action No. 74-123-P, S/D Ala., 9/30/74, at p. 22:

> "It is only fitting that the government take the lead in the battle against discrimination by ferreting out and bringing an end to racial discrimination in its own ranks."

Mobile has no ordinances proclaiming equal employment opportunity, either public or private, to be its policy. There are no non-discriminatory rental ordinances. On the one hand, the federal courts are often subjected to arguments by recalcitrant state and local officials of the encroachment of the federal bureaucracy and assert Tenth Amendment violations—while making no mention that were it not for such "encroachment" citizens would not have made the progress they have to fulfillment of equal rights. Recent history bears witness to this proposition.

difficult for the black citizens of Mobile County. Past discriminatory customs and laws that were enacted for the sole and intentional purpose of extinguishing or minimizing black political power is responsible. The purposeful excesses of the past are still in evidence today. Indeed, Judge Rives, writing for a three-judge panel finding the Alabama poll tax to be unconstitutional, stated forcefully:

> "'The long history of the Negroes' struggle to obtain the right to vote in Alabama has been trumpeted before the Federal Courts of this State in great detail. *** If this Court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf.' We would be blind with indifference, not impartiality, and deaf with intentional disregard of the cries for equality of men before the law." *U.S. v. State of Alabama,* 252 F. Supp. at 104 (M.D. Ala. 1966), [citing *Sims v. Baggett,* 247 F. Supp. 96, 108-09 (M.D. Ala. 1965)].

Without question, past discrimination, some of which continues to today as evidenced by the orders in several lawsuits in this court against the city and county, and demonstrated in the lack of access to the selection process and the school commissioners' unresponsiveness, contributes to black voter dilution.

5. **ENHANCING FACTORS.**

Zimmer, in addition to enumerating four substantial criteria in proving voter dilution, listed four "enhancing factors" that should be considered as proof of aggravated dilution.

a. *Large Districts.* The present at-large election system is as large as possible, i.e., the county. The county, with an area of 1,240 square miles and 317,308 persons, according to the 1970 Census, can reasonably be divided into election districts. It is common knowledge that numerous counties in the State have countywide officers such as county commissioners, divided into single-member districts and function reasonably well. It is large enough to be considered large within the meaning of this factor.

b. *Majority Vote Requirements.* There is a majority vote requirement for primary elections, Title 17, Sec. 366, *Code of Alabama* (1958). There is no such requirement in

the general election. Very rarely, if ever, have more than two persons opposed one another in a general election. As a practical matter, in the past, the effects of a majority vote have prevailed.

c. *Anti-single Shot Voting.* There is no anti-single shot voting provision in the present system of electing members of the Board. The Board members do run for a numbered place, Title 17, Sec. 153(1), *Code of Alabama* (1958). This place provision has to some extent the same result as the anti-single shot voting provision. At least in part, the practical results of an anti-single shot provision obtains in Mobile County.

d. *Lack of Residency Requirement.* The present system of election of the Board members does not contain any provision requiring that any commissioner reside in any specific district or one geographical area of the county.

IV.

The court has made a finding for each of the *Zimmer* factors, and most of them have been found in favor of the plaintiffs. The court has analyzed each factor separately, but has not counted the number present or absent in a "score-keeping" fashion.

The court has made a thoughtful, exhaustive analysis of the evidence in the record ". . . paying close attention to the facts of the particular situations at hand," *Wallace,* 515 F.2d at 631, to determine whether the minority has suffered an unconstitutional dilution of the vote. This court's task is not to tally the presence or absence of the particular factors, but rather, its opinion represents ". . . a blend of history and an intensely local appraisal of the design and impact of the multi-member district [under scrutiny] in light of past and present reality, political and otherwise." *White,* 412 U.S. at 769-70.

The court reaches its conclusion by following the teachings of *White, Dallas* v. *Reese,* 421 U.S. 477, 480, 95 S. Ct. 1706, 44 L.Ed.2d 312 (1975), *Zimmer, Fortson,* and *Whitcomb,* et al.

The evidence when considered under these teachings convinces this court that the at-large districts "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb,* 403 U.S. at 143, and *Fortson,* 379 U.S. at 439, and "operates impermissibly to dilute the voting strength of an identifiable element of the voting population,". *Dallas,* at 480. The plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors catalogued in *Zimmer.*

In summary, this court finds that the electoral structure, the multi-member at-large election of Mobile County School Commissioners, results in an unconstitutional dilution of black voting strength. It is "fundamentally unfair", *Wallace,* 515 F.2d at 630, and invidiously discriminatory.

The Supreme Court has laid down the general principle that "when District Courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor v. Johnson,* 402 U.S. 690, 692, 91 S. Ct. 1760, 29 L.Ed.2d 268 (1971). The Court reaffirmed this twice in the last term. *East Carroll Parish School Board,* and *Wallace, supra.* Once the racial discriminatory evil has been established, as it was in *White,* the dilution occasioned by the multi-member at-large election requires the disestablishment of the multi-member at-large election and the obvious remedy is to establish single-member districts.

This court does not endorse the idea of quota voting or elections, nor of a weighted vote in favor of one race to offset racial prejudice or any other adversity. However, when the electoral structure of the government is such, as in this case, that racial discrimination precludes a black voter from an effective participation in the election system, a dilution of his and other black votes has occurred.

The moving spirit present at the conception of this nation, "all men are created equal," will not rest and the great purpose of the Constitution to "establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and

our Posterity . . ." will be only a dream until every person has an opportunity to be equal. To have this opportunity, every person must be treated equally. This includes being treated equally in the electoral process.

A county school commissioner election plan which includes small single-member districts will provide blacks a realistic opportunity to elect blacks to the Board of School Commissioners. No such realistic opportunity exists as the Board is presently structured. A single-member district plan would afford such an opportunity. Blacks' effective participation in the elective system will have the salutary effect of giving them a realistic opportunity to get into the mainstream in the operation of Mobile's school system which has a ratio range of 55 to 45, 60/40 white/black students. It will give them an opportunity to have an input and impact on the educational system. Good quality education equally available to all, (with the people having a compassionate concern, love, for one another) probably affords the best hope for a strong democracy and the sharing of this nation's economic and social benefits. It will afford an opportunity for a more meaningful dialogue between the whites and blacks to develop.

V.

There is a traditional constitutional tolerance of various forms of local government. See, e.g., *Abate* v. *Mundt,* 403 U.S. 182, 185, 91 S. Ct. 1904, 29 L.Ed.2d 399 (1971).

The court recognizes the "delicate issues of federal-state relations underlying this case." *Mayor of the City of Philadelphia,* 415 U.S. at 615.

The single-member districts have advantages other than correcting constitutional differences as found in this decree.[28]

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[28] *William Dove, Sr., et al. v. Charles E. Moore, et al.,* S.O. 75-1918 (8th Cir. 7/27/76), set out in footnote 3:

> "The author has previously discussed at length the undersirable characteristics of at-large elections and the benefits of single-member districts. *Chapman v. Meier,* 372 F. Supp. 371, 388-94 (D. N.D. 1974) (three-judge court) (Bright, J., dissenting), *majority reversed,* 420 U.S. 1 (1975). In the
>
> *(footnote continued)*

The court hereby adopts the plan, including the map designating the districts, submitted by the plaintiffs and attached as "Appendix B" and is part of this decree the same as if set out at length herein. This plan divides the county into five single-member districts. The lines are drawn along traditional precinct lines which will minimize voting conflicts. There is a maximum population variation in the districts of 6.3%.

(footnote continued)

> context of a discussion of proposed plans for the reapportionment of a state legislature, the dissent emphasized the following benefits of single-member districts:
>
> (1) It gives a voter a chance to compare only two candidates, head to head in making a choice.
>
> (2) It prevents one political party with a heavy plurality in one or two potential districts from dominating other potential districts that might narrowly go for the candidate of the opposite party.
>
> (3) It prevents a city wide political organization from ostracizing or disciplining a legislator, who dares stray from the machine's line.
>
> (4) It permits a citizen to identify a legislator as his senator and makes direct communication easier.
>
> (5) It makes each senator responsible for his actions and makes it difficult for a senator to fade into the ranks of "the team" to avoid being identified with specific actions taken.
>
> (6) It reduces campaign costs and "personalizes" a campaign.
>
> (7) It creates greater interest in the possibility of a citizen seeking a legislative seat without the political machine blessing.
>
> (8) It would diminish the animosity created in the legislature against multi-senate districts because of the tendency of senators elected by one political party from a city to vote as a bloc.
>
> (9) It would tend to guarantee an individual point of view if all senators are not elected as a team.
>
> (10) It would equalize the power of people in single senate districts with the people in the broken down multi-senate districts to *influence* the election of only one senator.
>
> [372 F. Supp. at 391 (footnote omitted) (emphasis in original).]

The court has stated repeatedly to the parties that it felt constrained to tinker with the present size of the membership and other features of the existing method of election as little as possible, i.e., require only that which is necessary to meet the constitutional mandates of this decree.

The Commissioners for Districts 3 and 4 will be elected in 1978. Commissioners for Districts 2 and 5 will be elected in November, 1980. The commissioner for District 1 will be elected in November, 1982. The commissioners will take office on the date as provided by the laws of the State of Alabama.

As the single-member districts are elected in the future, each school commissioner shall have been a resident of the district which that person represents for not less than 12 months immediately preceding that person's election and shall reside in the district during that person's term of office. All other qualifying and eligibility requirements should be that as provided by the laws of the State of Alabama. All other laws of the State of Alabama as apply to the Mobile County School System not in conflict with this order shall govern.

The Board since 1919 has been made up of five members. Various proposals have been made to enlarge the membership and designate when the new members should be elected. It is the court's considered judgment that changes made by the court should be minimal and only to correct constitutional deficiencies. For these reasons, the number of the members of the Board, the length of the term of office, and the staggered office terms and election, are to remain as provided by the legislature.

The plaintiffs desired a hearing far enough in advance of the November election for the court to make a decision, and if single-member districts were provided, that a special election be held prior to the 1976 general election with the winners of the various party elections being placed on the November general election ballot. If this was not done, they requested a special election be called after the general election.

The defendants desired that all elected members of the Board be allowed to serve out their respective terms until vacancies were created in sufficient number to fill the single-member districts predominantly populated by black voters.

Due to the time problems created by the dismissal, and later adding the school commissioners as defendants, the defendants would not have had sufficient time to prepare their defense, and the court would have been unable to make a reasoned judgment for elections to be held in 1976.

The court is unwilling to put the taxpayers to the expense of special elections, and the court is unwilling to deny the blacks the relief they are entitled to until 1980, a period of four years. The court is desirous of mitigating the adjustment and seeing that each elected member on the Board serves the longest possible period of time.

During the course of the trial, the court was advised by these defendants that they were interested in implementing a single-member district plan, shortening the litigation and reducing the expenses. They requested an opportunity for the defendants and plaintiffs to negotiate a compromise settlement. The parties indicated they desired some guidelines from court concerning when the election of single-member representatives would take place, and, if any of the elected members' terms would be shortened, which one. The court stated in substance the above election schedule and stated it appeared equitable to the court that if any member's terms were shortened, it should be those who had the least remaining time of service remaining on their six year term.

This approach continues to be the view of the court as an equitable solution. The present board members who will have the least remaining time of service, or who will have served most of their elected term at the time of the 1978 elections, will be Board members Alexander and Drago.

Under the ordered single-member district plan which requires residence in the district which the commissioner represents, the present Board members now reside in the districts as follows:

Commissioners Bosarge, Alexander, and Berger in District 2.

Commissioner Sessions in District 4.

Commissioner Drago in District 5.

No one resides in District 3 which has a majority black population and is entitled to a commissioner in 1978. Commissioner Sessions resides in District 4 which has a majority black population and is entitled to a place in 1978. Commissioner Sessions' term expires in 1978 and there will automatically be a vacancy for that district at that time.

In order for District 3 to have a place, one other Board member's term must be shortened or modified. Proceeding on the premises above stated of shortening or modifying members' terms who had the least remaining time of service, the choice narrows to Commissioners Alexander and Drago.

It appears more equitable to the court to modify one commissioner's powers and duties and allow that commissioner to complete his term rather than shorten it. For the remaining four commissioners, presently in office, after 1978, to complete their currently elected terms with new commissioners to be elected for Districts 3 and 4 in 1978, would make a Board consisting of six members. A six member board would lend itself to possible tie votes of three to three. The Board could be rendered ineffective under such conditions.

Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election in 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election in 1978, but will be occupied by either Commissioner Alexander or Drago.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve until the general election in 1980, and the successors for the two places elected in 1980 have qualified and taken office. The Chairman to be elected is to be either Commissioner Alexander or Commissioner Drago, the two members of the present board with the least remaining years of service in their

elected term. Their present terms expire after the general election in November, 1980, when their successors have been elected, qualified and taken office according to the laws of Alabama. The Chairman will have all the powers the Chairman would have under the law, rules, and regulations they are governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstension, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners for Districts 3 and 4; there shall be elected in November, 1980, school commissioners for Districts 2 and 5; and there shall be elected in November, 1982, a school commissioner from District 1.[29]

It is further ORDERED, ADJUDGED and DECREED that whenever there shall be a change in any of the five districts heretofore established, evidenced by a federal census of population published following a federal census hereafter taken, there shall be a reapportionment of the school commissioner districts in the manner hereinafter provided.

(1) The school commissioners shall within six months after the publication of each decennial federal census of population for the county, commencing with the 1990 census, file with this court a report containing a recommended plan for the reapportionment of the school commissioner boundaries to comply with the following specifications:

> (a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall follow State Senate and House district lines, ward or precinct lines, to the maximum extent possible and other boundary lines shall be the center lines of streets or other well defined boundaries.
>
> (b) Each district shall contain as nearly as is reasonable, the same population.

---

[29] All the Districts to be as described in Appendix B.

(2) The report shall include a map and description of the districts.

(3) The provisions of the 1965 Voting Rights Act shall be complied with.

(4) The school commissioners shall comply with any other United States Congressional legislation relating to this subject matter and in compliance with the United States constitutional law.

(5) Upon compliance the above provisions, the redistricting should become effective.

(6) Such redistricting shall not apply to any regular or special election held within six months after its becoming effective. No incumbent member of the Board shall be deprived of his unexpired term of office because of such redistricting.

It is further ORDERED, ADJUDGED and DECREED that the defendants, John L. Moore, individually and in his official capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacites as School Commissioners of Mobile County, Alabama; the Board of School Commissioners of Mobile County, Alabama, and Mobile County, Alabama, their agents, servants, employees, and successors, are hereby ENJOINED from failing to:

(1) Redistrict as set out above.

(2) Make and hold the elections as redistricted.

The defendant Board of School Commissioners and Mobile County are taxed with the costs, including attorneys' fees.

Within 30 days from this date, the attorneys for the plaintiffs are to file affidavits setting forth their claim for attorneys' fees, including hours worked and hourly charges.

The defendants, School Board Commissioners and Mobile County, are to be sent a copy of this claim and these defendants may object in writing within 15 days.

This court retains jurisdiction for the implementation of this order.

Done, this the 9th day of December, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
9TH DAY OF DECEMBER 1976
WILLIAM J. O'CONNOR, CLERK

[Caption Omitted in Printing]

"APPENDIX A"
ORDER ON DEFENDANT BOARD OF SCHOOL COMMISSIONERS' MOTION TO SEVER AND DISMISS OR CONTINUE

The defendant's motion to sever is hereby DENIED. The defendant's motion to dismiss is hereby DENIED.

The defendant's motion to continue in order to give the legislature of the State of Alabama an opportunity to act on a proposed redistricting is hereby DENIED.

The complaint was filed June 9, 1975. The defendant's attention is directed to a conference with the attorneys for the Board of School Commissioners, the County Commissioners, and the City Commission of the City of Mobile, in open court on July 14, 1976. The long delay of the defendant in answering the complaint making the School Board, et al., defendants a second time, was called to the attention of the attorney for the defendant School Board.

It was at the request of the defendant School Board that a continuance was granted of the trial of their case at that time, although there were mitigating court scheduling problems.

It was common knowledge at that time that a proposed redistricting plan had been passed at a previous session of the Legislature but later declared unconstitutional. It was common knowledge there was pending in the State Legislature which was then in session a redistricting plan. The court specifically advised counsel for all the parties that the court would not be disposed to further delay the trial or decision after the September, 1976, setting, and if any, or all of the defendants, anticipated seeking changes in the makeup or districting of their respective Commissions or Boards, they should take action while the Legislature was then in session. Due to the age of this case, and the Legislature having had two opportunities to act during its pendency, additional delays are not justified.

Done, this the 7th day of September, 1976.

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
7TH DAY OF SEPTEMBER 1976
WILLIAM J. O'CONNOR, CLERK

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

"APPENDIX B"

Analysis of Plaintiffs' Plan for School Board

District	Ward/Precinct	Population	% Black VAP	Weighted Black Pop.
1	100-4	7,760	.006	46
	101-1	7,310	.007	51
	North	37,665		7,514
	West	12,851		1,538
		65,585		9,149
				13.9%
2	104-5	4,767	.02	95
	South	34,924		5,148
	100-1	3,122	.05	156
	100-2	2,078	.08	166
	100-3	7,007	.22	1,542
	101-3	5,520	.004	22
	101-2	4,196	.026	109
		61,614		7,238
				11.7%
3	Prichard	41,578		21,005
	98-1	9,438	.666	6,286
	99-1	12,700	.91	11,565
		63,725		38,856
				61.0%
4	99-2	8,664	.954	8,265
	99-3	4,510	.906	4,086
	99-4	5,536	.997	5,519
	103-1	8,946	.995	8,901
	103-2	4,672	.465	2,172
	103-3	8,903	.636	5,662
	102-2	4,896	.03	147
	102-3	4,244	.01	42
	103-4	11,412	.026	297
		61,790		35,091
				56.8%
5	102-4	2,704	.003	8
	102-6	5,280	.043	227
	102-7	3,872	.785	3,040
	102-1	4,793	.22	1,054
	102-5	6,914	.000	0
	101-4	5,888	.074	432
	104-1	8,091	.117	947
	104-2	3,514	.07	246
	104-3	8,410	.067	563
	104-4	6,029	.008	48
	101-5	5,664	.074	419
	101-6	3,489	.074	258
		64,598		7,242
				11.2%

Sources: figures compiled by Tony Parker for regression analysis

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,

v.

CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, etc., et al.,
Defendants.

ORDER AND DECREE AMENDING ORDER AND DECREE DATED DECEMBER 9, 1976

The opinion and order signed by this court December 9, 1976, is AMENDED as follows:

The style of the case is AMENDED to read as follows:

"LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,

Plaintiffs,

v.

CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County; HOWARD E. YEAGER, COY SMITH, G. BAY HAAS, individually and in their official capacity as Mobile County Commissioners; MOBILE COUNTY; THE BOARD OF SCHOOL COMMISSIONERS, ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, individually and in their official capacity as School Commissioners of Mobile County, Alabama,

Defendants."

On page 3, the first paragraph is AMENDED to read as follows:

"This court has jurisdiction over the claims grounded on 42 U.S.C. Sec. 1983 against the Board members and over the claims grounded on 42 U.S.C. Sec. 1973 against all defendants and under 28 U.S.C. Secs. 1343(3)-(4) and 2201."

On page 3, that portion of the fourth paragraph ". . . the Sheriff, and Mobile County." is AMENDED to read "the Sheriff and the Board of School Commissioners of Mobile County."

On page 44, the second and third sentence in the first pararaph is AMENDED to read as follows:

"The Commissioner for District 5 will be elected in November, 1980. The Commissioners for Districts 1 and 2 will be elected in November, 1982."

On page 44, in the third paragraph, the portion of the second sentence, which reads as follows:

". . . and the staggered office terms and election, are to remain. . . ." is AMENDED to read as follows:

". . . and the staggered office terms and election, except as modified herein, are to remain. . . ."

Page 47 is AMENDED to read as follows:

"Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election prior to November, 1980, but will be occupied by either Commissioner Alexander or Drago until the expiration of the period of the present term they are now serving.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve to the end of the term in 1980 for which that person has been elected. The Chairman to be elected is to be either Commissioner Alexander or Commissioner Drago, the two members of the present Board with the least remaining years of service in their elected term. Their present terms expire after the general election in November, 1980.

Since Commissioner Drago's term expires at that time and her place would ordinarily be up for election in the general election of November, 1980, her successor will be elected from District 5 in the general election of 1980. Commissioner Drago will serve to the end of the term for which she has been elected and until her successor has been elected, qualified, and taken office according to the laws of Alabama. Since Commissioner Alexander resides in District 2, and Commissioners Bosarge and Berger live in District 2, no vacancy will exist in that district in 1980. Commissioner Alexander will serve until the end of the term in 1980 to which he was elected in 1974.

The Chairman elected under this order will have all the powers the Chairman would have under the law, rules, and

regulations the Chairman is now governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstension, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners from District 3 and 4; there shall be elected in November, 1980."

On page 48, the first three lines are to be AMENDED to read as follows:

"a school commissioner for District 5; and there shall be elected in November, 1982, school commissioners from District 1 and 2.[29]"

Done, this the 13th day of December, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
13TH DAY OF DECEMBER 1976
MINUTE ENTRY NO. 42431
WILLIAM J. O'CONNOR, CLERK
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,

Plaintiffs,

v. CIVIL ACTION No. 75-298-P

JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County; HOWARD E. YEAGER, COY SMITH, G. BAY HAAS, individually and in their official capacity as Mobile County Commissioners; ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, individually and in their official capacity as School Commissioners of Mobile County, Alabama,

Defendants.

JUDGMENT

This court has heretofore entered its findings of fact and conclusions of law in favor of the plaintiffs and against the defendants, John L. Moore, individually and in his official

capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his official capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County; Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacity as School Commissioners of Mobile County, Alabama, and Mobile County, Alabama.

The court has found that the electoral structure, the multi-member at-large election of the School Commissioners of Mobile County, results in an unconstitutional dilution of the black plaintiffs' voting strength. It is fundamentally unfair and invidiously discriminatory.

In the plan adopted and approved by the court and attached to the court's Opinion and Order as "Appendix B" thereof, the Commissioners for Districts 3 and 4 will be elected in 1978. A commissioner for District 5 will be elected in November, 1980. The commissioners for Districts 1 and 2 will be elected in November, 1982. The commissioners will take office on the date as provided by the laws of the State of Alabama.

As the single-member districts are elected in the future, each school commissioner shall have been a resident of the district which that person represents for not less than 12 months immediately preceding that person's election and shall reside in the district during that person's term of office. All other qualifying and eligibility requirements should be that as provided by the laws of the State of Alabama. All other laws of the State of Alabama as apply to the Mobile County School System not in conflict with this order shall govern.

The number of the members of the Board, the length of the term of office, and the staggered office terms and election, are to remain as provided by the legislature.

Under the ordered single-member district plan which requires residence in the district which the commissioner represents, the present Board members now reside in the districts as follows:

Commissioners Bosarge, Alexander, and Berger in District 2.

Commissioner Sessions in District 4.

Commissioner Drago in District 5.

No one resides in District 3 which has a majority black population and is entitled to a commissioner in 1978. Commissioner Sessions resides in District 4 which has a majority black population and is entitled to a place in 1978. Commissioner Sessions' term expires in 1978 and there will automatically be a vacancy for that district at that time.

In order for District 3 to have a place, one other Board member's term must be shortened or modified. Proceeding on the premises stated of shortening or modifying members' terms who had the least remaining time of service, the choice narrows to Commissioners Alexander and Drago.

Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election in 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election prior to November, 1980, but will be occupied by either Commissioner Alexander or Drago until the expiration of the period of the present term they are now serving.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve to the end of the term in 1980 for which that person has been elected. The Chairman to be elected is to be either

Commissioner Alexander or Commissioner Drago, the two members of the present Board with the least remaining years of service in their elected term. Their present terms expire after the general election in November, 1980.

Since Commissioner Drago's term expires at that time and her place would ordinarily be up for election in the general election of November, 1980, her successor will be elected from District 5 in the general election of 1980. Commissioner Drago will serve to the end of the term for which she has been elected and until her successor has been elected, qualified, and taken office according to the laws of Alabama. Since Commissioner Alexander resides in District 2, and Commissioners Bosarge and Berger live in District 2, no vacancy will exist in that district in 1980. Commissioner Alexander will serve until the end of the term in 1980 to which he was elected in 1974.

The Chairman elected under this order will have all the powers the Chairman would have under the law, rules, and regulations the Chairman is now governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstention, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners from District 3 and 4; there shall be elected in November, 1980, a school commissioner for District 5; and there shall be elected in November, 1982, a school commissioner from District 1 and a school commissioner from District 2.[1]

It is further ORDERED, ADJUDGED and DECREED that whenever there shall be a change in any of the five districts

[1] All the Districts to be as described in Appendix B to the Opinion and Order.

heretofore established, evidenced by a federal census of population published following a federal census hereafter taken, there shall be a reapportionment of the school commissioner districts in the manner hereinafter provided.

(1) The school commissioners shall within six months after the publication of each decennial federal census of population for the county, commencing with the 1990 census, file with this court a report containing a recommended plan for the reapportionment of the school commissioner boundaries to comply with the following specifications:

(a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall follow State Senate and House district lines, ward or precinct lines, to the maximum extent possible and other boundary lines shall be the center lines of streets or other well defined boundaries.

(b) Each district shall contain as nearly as is reasonable, the same population.

(2) The report shall include a map and description of the districts.

(3) The provisions of the 1965 Voting Rights Act shall be complied with.

(4) The school commissioners shall comply with any other United States Congressional legislation relating to this subject matter and in compliance with the United States constitutional law.

(5) Upon compliance with the above provisions, the redistricting should become effective.

(6) Such redistricting shall not apply to any regular or special election held within six months after its becoming effective. No incumbent member of the Board shall be deprived of his unexpired term of office because of such redistricting.

It is further ORDERED, ADJUDGED and DECREED that the defendants, John L. Moore, individually and in his official capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacities as School Commissioners of Mobile County, Alabama; the Board of School Commissioners of Mobile County, Alabama, and Mobile County, Alabama, their agents, servants, employees, and successors, are hereby ENJOINED from failing to:

(1) Redistrict as set out above.

(2) Make a hold the elections as redistricted.

The defendant Board of School Commissioners is taxes with the costs, including attorneys' fees.

Within 30 days from this date, the attorneys for the plaintiffs are to file affidavits setting forth their claim for attorneys' fees, including hours worked and hourly charges. The defendant School Board Commissioners are to be sent a copy of this claim and these defendants may object in writing within 15 days.

This court retains jurisdiction for the implementation of this order.

Done, this the 18th day of January, 1977.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
18th DAY OF JANUARY 1977
WILLIAM J. O'CONNOR, CLERK

RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT IN BROWN V. MOORE

ATTORNEYS

Plaintiffs

GREGORY B. STEIN
J.U. BLACKSHER
1407 Davis Avenue
Mobile, Alabama 36603

EDWARD STILL
Suite 601, Title Building
2030 3rd Avenue, North
Birmingham, Alabama 35203

JACK GREENBERG,
JAMES M. NABRIT, III and
CHARLES E. WILLIAMS, III
Suite 2030, 10 Columbus Circle
New York, New York 10019

Defendants

MOORE, MANDEVILLE, PURVIS AND FOR
YEAGER, SMITH AND HAAS

JAMES C. WOOD
Assistant County Attorney
1010 Van Antwerp Building
Mobile, Alabama 36602

RALPH KENNAMER
P.O. Box 624
Mobile, Alabama 36601

SCHOOL COMMISSIONERS, WILLIAMS, ALEXANDER, BERGER, DRAGO & SESSIONS

ABE PHILIPS—WITHDRAWN 12-21
P. O. Box 8158
Mobile, Alabama 36608

Attorneys for Robert Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually & in their official capacity, etc.
Messrs. Robert C. Campbell, III, Daniel A. Pike, and Frank G. Taylor,
The Plaza West Building
800 Downtowner Blvd.
Mobile, Alabama 36609

Date	Proceedings
6/9/75	Complaint filed, lps
7/8/75	Motion to Dismiss, with brief, filed by defendants Moore, Mandeville, Purvis, Yeager, Smith and Haas, with further Motion to Strike, Ajr
7/15/75	Motion to Dismiss, with brief, and Motion to Strike, filed by defendants Williams, Alexander, Berger, Drago and Sessions, Ajr
8/29/75	Motion to Dismiss and Motion to Strike, filed by defendants Moore, et al and Motion to Dismiss and Motion to Strike, filed by defendants Williams, et al, Submitted without argument, Ajr
9/26/75	Status Report. AMENDMENT TO STANDARD PRE-TRIAL ORDER and DISCOVERY EXTENDED TO AND INCLUDING NOV. 10, 1975, and naming of witnesses on or before Nov. 25, 1975. Copy of this Amendment to Standard Pre-Trial Order mailed to the Attorneys of Record on 9-30-75 (W.J.O.)
11/21/75	ORDER entered that cause of action against Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually & in their official capacity as School Commissioners of Mobile County, Alabama, is DISMISSED, without prejudice; M/E No. 39,409-H; copy mailed to attorneys on 11/28/75, wet
11/28/75	Status Report. No Problems. Set this case for Pre-Trial the same date as Civil 75-297, Bolden v. City of Mobile (W.J.O.)
12/15/75	Motion for certification of class filed by plaintiffs; referred to Magistrate; notice mailed attorneys, wet
12/17/75	Appearance of Counsel for plaintiffs filed by Jack Greenberg, James M. Nabrit, III and Charles E. Williams, III Ajr

Date	Proceedings
12/29/75	Order entered that defendants' motion to dismiss under 42 U.S.C. Sec. 1973 is DENIED; defendants' motion to dismiss under 42 U.S.C. Sec. 1985(3) is GRANTED; defendants' motion to dismiss under Sec. 1343(4) DENIED; defendants' motion to strike attorneys' fees and the injunctive relief in Par. V-2 is DENIED, Min. Entry No. 39647; copy mailed to Attorneys, Ajr
1/7/76	Answer to complaint filed by defendants Moore, Mandeville, Purvis, Yeager and Haas, Ajr
1/8/76	Motion to Dismiss Certain plaintiff, Hazel C. Hill, without prejudice, filed by plaintiffs, Ajr
1/13/76	Preliminary pretrial order for pretrial set the 4th day of February, 1976, entered by Judge Pittman, filed copies of order mailed to attorneys on 01-07-76 by Mrs. Madge Andress, grs
1/14/76	Motion to Dismiss Certain plaintiff (Hazel C. Hill), without prejudice, filed by plaintiffs January 8, 1976 GRANTED, notices mailed Ajr
1/19/76	Order entered that plaintiffs may maintain this action as a class action, Minute Entry No. 39,815; copies mailed to attorneys, Ajr
1/29/76	Motion for preliminary injunction filed by plaintiffs, jb
2/2/76	Appearance of Ralph Kennamer as attorney for defendants filed, wet Joint Pretrial Document filed by parties, wet
2/4/76	Motion to add party defendant filed by plaintiffs; referred to Judge Pittman, wet
2/4/76	CASE PRE TRIED ON 4 Feb. 1976 by JUDGE VIRGIL PITTMAN (WJO)
2/5/76	ORDER entered on pretrial hearing, copies mailed to attorneys by Mrs. Madge Andress, grs
2/10/76	WITHDRAWAL of plaintiffs' motion for preliminary injunction filed by plaintiffs Leila G. Brown, et al. mpc

Date	Proceedings
2/10/76	ORDER entered as follows: 1. Plaintiffs' motion to join County of Mobile, Alabama as party defendant is GRANTED as to plaintiffs' claims predicated on 42 USC 1973 and is DENIED as to plaintiffs' claims predicated on 42 USC 1983 and 1985. 2. Clerk is directed to cause service of process on said defendant. Such service shall be accompanied with copies of answer of certain of individual defendants filed on 1/7/76 (File Doc. No. 76), the motion to join Mobile County as a party defendant filed by plaintiffs on 2/4/76 (File Doc. No. 90), and a copy of this order. 3. Clerk is further directed to mail a copy of this order together with other documents described above to Maury Friedlander, Attorney for the County of Mobile. Above entry is in M/E No. 40,012; copy mailed to attorneys on 2/12/76, wet.
2/25/76	Motion to dismiss filed by defendant, brief attached, jb
2/25/76	Specification of racially discriminatory acts filed by plaintiffs
3/1/76	Motion to Add Parties Defendant, filed by the plaintiff, Ajr
3/8/76	Motion to Add Parties Defendant, filed by the defendants March 1, 1976 GRANTED; notices mailed Ajr
3/12/76	Status Report, no problems. Judge Pittman to set date for trial Motion to dismiss, filed by defendant on Feb. 25, 1976 submitted without argument, Ajr
3/19/76	Following documents given to USM for service on each of eleven (11) defendants as set out after list of documents: 1. Clerk's notice of Judge Pittman's decisions granting plaintiffs' motion to add parties defendant - March 8, 1976.

Date	Proceedings
	2. Motion to add parties defendant & attachments filed Mar. 1, 1976.
	3. Pretrial Order, Feb. 4, 1976.
	4. Joint pretrial document, filed on or about January 28, 1976.
	5. Order on motion to dismiss entered December 29, 1975, Minute Entry No. 39647.
	6. Motion to dismiss filed on or about July 8, 1975.
	Defendants to be served with above described documents are:
	BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY,
	ROBERT R. WILLIAMS, Individually,
	ROBERT R. WILLIAMS, Official capacity,
	DAN C. ALEXANDER, JR., Individually,
	DAN C. ALEXANDER, JR., Official capacity,
	NORMAN J. BERGER, Individually,
	NORMAN J. BERGER, Official capacity,
	RUTH F. DRAGO, Individually,
	RUTH F. DRAGO, Official capacity,
	HOMER L. SESSIONS, Individually,
	HOMER L. SESSIONS, Official capacity, wet
3/23/76	Return of USM filed showing service of those documents as listed in entry of 3/19/76 above on all defendants, lps
3/30/76	Motion to Dismiss, filed by the defendant Mobile County on Feb. 25, 1976 and submitted March 12, 1976, DENIED; notices mailed Ajr
6/22/76	Qualifications of expert witness filed by defendants, with attachment
6/28/76	Witness list of defendants, John L. Moore, John E. Mandeville, Thomas J. Purvis, Howard E. Yeager and G. Bay Haas, filed, grs

Date	Proceedings
6/29/76	Plaintiffs' witness list filed, wet
	Objections to qualifications of defendants' expert witness, filed by plaintiffs, wet
7/6/76	Motion for continuance filed by defendants, Mobile County School Commissioners, Ajr
7/8/76	Motion for continuance, filed by defendants, Mobile County School Commissioners DENIED, notices mailed Ajr
7/9/76	Supplemental witness list filed by defendants, jrb
7/12/76	Motion for Default Judgment, filed by plaintiffs,
	Affidavit for entry of default by clerk, filed by plaintiffs, Ajr
7/12/76	Second motion for continuance filed by defendants, Mobile County School Commissioners, Taken to Judge Pittman by Mr. Philips, jb
7/12/76	ANSWER to Amended Complaint filed by Defendants, the Board of School Commissioners of Mobile County and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, grs
7/13/76	Response to Motion for Default Judgment, filed by defendant, Board of School Commissioners of Mobile County, Ala., Ajr (DENIED orally)
7/14/76	Supplemental witness list filed by defendants MOORE, MANDEVILLE, PURVIS, YEAGER and HAAS, jb
7/15/76	Amendment to Standard Pretrial Order and DISCOVERY EXTENDED TO AND INCLUDING July 26, 1976, AND NAMING OF WITNESSES ON OR BEFORE July 30, 1976. Copy of this Amendment mailed on 15 July 1976 to Messrs. Blacksher, Still, Greenberg, Wood, Kennamer, and Philips (W.J.O.)
7/20/76	Preliminary pretrial order for pretrial set the 2nd day of AUGUST, 1976, entered by Judge Pittman filed, copies of order mailed to attorneys on 7/15/76 by Mrs. Madge Andress, grs

Date	Proceedings
7/30/76	Supplemental joint pretrial document relevant to MOBILE COUNTY SCHOOL BOARD, filed by the parties, grs
7/30/76	List of witnesses filed by defendant, Ajr
8/2/76	CASE PRE TRIED ON 2 AUGUST 1976 BY JUDGE VIRGIL PITTMAN (WJO)
8/9/76	ORDER entered on pretrial hearing, copies mailed to attorneys by Mrs. Madge Andress, grs
8/26/76	First Response to order on pre-trial hearing filed by defendant BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, wet
9/2/76	Motion to Sever and to Dismiss or Continue filed by defendant Board of School Commissioners of Mobile County mpc
9/2/76	Response to Order on Pretrial Hearing filed by defendant Board of School Commissioners relating to submission to the Court of proposed reapportionment plan
9/2/76	DEFENDANTS' PROPOSED PLAN for Commission Districts filed, with Map attached, mpc (in separate red folder, with other plans)
9/3/76	PLAINTIFFS' PROPOSED REAPPORTIONMENT PLANS for Mobile County filed with two maps as Exhibits (placed in red folder with other Plans) mpc
9/3/76	Motion to Strike and to exclude testimony and exhibits, filed by Plaintiffs, in reference to defendants' First Response to Order on Pretrial Hearing, mpc
9/7/76	ORDER entered on motions of Board of School Commissioners, filed September 2, 1976, *DENYING* defendant's motion to sever; *DENYING* defendant's motion to dismiss; and *DENYING* said defendant's motion to continue in order to give the Legislature of the State of Alabama an opportunity to act on a proposed redistricting; (Minute Entry No. 41649). Attorneys Blacksher, Menefee,

Date	Proceedings
	Kennamer, and Abe Philips notified by telephone; copies of order mailed to all attorneys of record on 9/7/76 mpc
9/9/76	Response to Plaintiff's Motion to Strike & to exclude testimony
9/9/76	MOTION TO RECONSIDER the Court's Order of Sept. 7, 1976 denying motion of defendant Board of School Commissioners to Sever, denying motion of defendant Board of School Commissioners to Dismiss, and denying motion of defendant Board of School Commissioners to Continue trial of case, filed in open Court, and *DENIED* by the Court.
9/9/76	MOTION TO STAY pending Certification for Interlocutory Appeal and Pending Interlocutory Appeal, filed by defendants Board of School Commissioners, in open Court, and *DENIED* by the Court.
9/9/76	Motion to Stay pending Appeal, filed by defendants Board of School Commissioners, in open Court, and *DENIED* by the Court.
9/9/76	Motion to Certify for immediate Interlocutory Appeal the prior Order of this Court entered on Sept. 7, 1976, denying defendant Board of School Commissioners' Motion to Dismiss, denying the Defendants' Motion to Sever and denying the Defendants' Motion for a Continuance, filed in open Court by Defendants, the Board of School Commissioners, and its members, and *DENIED* by the Court.
9/9/76	NOTICE OF APPEAL filed in open Court by the Defendants, the Board of School Commissioners of Mobile County, and its members, individually and in their official capacities as the School Commissioners of Mobile County, from the Order of the Court entered on Sept. 7, 1976 denying Defendants' Motion to Sever, denying the Defendants' Motion to Dismiss and denying the Defendants' Motion to Continue.

Date	Proceedings
	(Each of the Court's rulings denying the above five(5) motions was announced to attorneys for the parties in open Court.)
	Trial by Court begun, witnesses sworn and examined on behalf of plaintiff, exhibits offered in evidence, trial RECESSED until Friday, September 10, 1976. (Minute Entry No. 41,663-A). mpc
	Trial by Court resumed, witnesses further examined on behalf of plaintiff, exhibits offered in evidence, trial RECESSED until Monday, September 13, 1976. (Minute Entry No. 41,668.) mpc
9/9/76	PROPOSED PLANS OF DEFENDANT BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY filed, mpc (in red folder with other Plans). mpc
9/13/76	Trial by Court resumed. Witnesses further examined by Plaintiffs; exhibits offered in evidence; trial RECESSED until Tuesday, Sept. 14, at 9:00 A.M. (Minute Entry No. 41,684A).
9/13/76	Withdrawal of Notice of Appeal from order entered on 9/7/76 denying defendants' motion to sever, denying defendants' motion to dismiss and denying defendants' motion to continue filed by defendants BOARD OF SCHOOL COMMISSIONERS, ET AL; copies mailed to attorneys and to Clerk, CCA by letter of transmittal, lps
9/14/76	TRIAL OF CAUSE BY COURT RESUMED. Witnesses further examined on behalf of Plaintiffs, exhibits offered, and trial RECESSED until Wednesday, September 15, 1976 at 9:00 A.M. (Minute Entry No. 41,691-C). mpc
9/15/76	Continuation of Deposition of DOCTOR CHARLES L. COTRELL filed
	TRIAL OF CAUSE BY COURT RESUMED. Witnesses further examined on behalf of plaintiffs, exhibits offered, and at 11:40 A.M., plaintiffs

Date	Proceedings
	conditionally rest their case. One witness examined on behalf of defendants, exhibits offered in evidence and trial of case RECESSED until Sept. 16, 1976, at 9:00 o'clock A.M. (Minute Entry No. 41712) mpc
9/16/76	TRIAL OF CAUSE BY COURT RESUMED. Witnesses further examined and exhibits offered on behalf of defendants Moore, etc. and said defendants conditionally rest. Witnesses examined on behalf of defendant School Board, and trial RECESSED to Friday, Sept. 17, 1976 at 9:00 A.M. (Minute Entry No. 41,728-B) mpc
9/17/76	TRIAL BY COURT RESUMED. Witnesses further examined on behalf of defendant Board of School Commissioners. At 3:15 P.M. all parties rest. Post trial arguments of counsel are heard, and trial RECESSED to a later date for arguments on the Plans submitted by the parties. (Minute Entry No. 41,737-C) mpc
9/21/76	SUBMISSION OF POST-TRIAL EVIDENCE filed by defendants, from the Mobile County Engineer, in letter form, pursuant to instruction from trial judge mpc
9/30/76	Plaintiffs' response to defendants' submission of post-trial evidence filed, grs
10/12/76	Statistical Data filed by defendants, wet
10/14/76	Submission of population estimates for plans of all parties filed by plaintiffs, wet
	Motion for alternative relief, with brief attached, filed by plaintiffs, wet
10/20/76	Brief re. Gerrymandering filed by defendants, mpc
10/21/76	Document entitled "AS TO COURT SUGGESTED PLAN FOR SINGLE MEMBER DISTRICTS" filed by Defendants, mpc
12/9/76	Opinion and order entered as to defendants BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ETC.:

Date	Proceedings
	1. That there shall be elected in Nov. 1978 school commissioners for Districts 3 & 4; there shall be elected in Nov. 1980 school commissioners for Districts 2 & 5; and there shall be elected in Nov. 1982 a school commissioner from District 1.
	2. That whenever there shall be a change in any of the 5 districts heretofore established, evidenced by a federal census published following a federal census hereafter taken, there shall be a reapportionment of the districts in the manner as more fully set out in order.
	3. Further ordered that defendants as more fully set out in order are ENJOINED from failing to: (1) Redistrict as set out in order. (2) Make & hold the elections as redistricted.
	Defendant BOARD OF SCHOOL COMMISSIONERS AND MOBILE COUNTY are taxed with costs, including attorneys' fees.
	Within 30 days from this date, attorneys for plaintiffs are to file affidavits setting forth their claim for attorneys' fees. Defendants School Board and Mobile County are to be sent copy of claim and defendants may object in writing within 15 days. Court retains jurisdiction; M/E No. 42,403; copy given to attorneys Larry Menefee, Abe Philips & Ralph Kennamer (copy also given attorney George Stone & The School Board); copy mailed attorneys Edward Still & Jack Greenberg; wet
12/10/76	Plaintiffs' re-analysis of plans for School Board and County Commission filed, wet
12/13/76	ORDER and decree amending order and decree dated 12/9/76 as more set out in order; M/E No. 42,431; copy mailed ALL attorneys on 12/14/76, wet
12/17/76	Plaintiffs' Motion for Award of Costs and Attorneys' fees, filed Ajr

Date	Proceedings
12/21/76	Motion for Re-Hearing of cause, filed by ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, ind. and in capacity as School Commissioners of Mobile County, Ala. Ajr (referred to Judge Pittman) ORAL ARGUMENT REQUESTED
	Withdrawal as Counsel of Record, filed by Abe Philips, Ajr
	Notice of Appearance of Counsel for defendants WILLIAMS, ALEXANDER, BERGER, DRAGO and SESSIONS filed by Daniel A. Pike for the firm of Sintz, Pike, Campbell & Duke Ajr
12/27/76	Motion to Strike, filed by the defendant Mobile County, Ajr (referred to Judge Pittman)
12/27/76	ORDER entered that attorneys for plaintiffs & for COUNTY COMMISSIONER are requested to submit additional proposed plans for districting of county. Plans are to be submitted on or before 1/3/77; M/E No. 42,528; attorneys advised by phone of order; on 12/29/76 copy of order mailed attorneys for plaintiffs and attorneys for defendants COUNTY COMMISSIONERS, wet
12/27/76	Order entered extending time from January 3, 1977 to January 6, 1977 within which to file plans, See M/E 42,534-B copies mailed attys
12/30/76	Motion for Re-Hearing filed by defendants SCHOOL BOARD COMMISSIONERS on 12/21/76 is argued & TAKEN UNDER SUBMISSION; wet
12/30/76	Order setting aside submission as to the matter of districting plans, See M/E 42,573, (je)
1/4/77	Motion for Re-Hearing filed by ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, indiv. & in their official capacity as School Commissioners of Mobile County, Alabama, on 12/21/76 is DENIED; notice of ruling mailed attorneys, wet

Date	Proceedings
1/5/77	Joint Proposal of Plan for the Mobile County Commission filed; wet
1/18/77	ORDER of judgment entered in favor of plaintiffs and against defendants as is more fully set out in order. Defendant BOARD OF SCHOOL COMMISSIONERS is taxed with costs, including attorneys' fees. Attorneys for plaintiffs to submit affidavits within 30 days. Def. SCHOOL BOARD COMMISSIONERS to be sent copy of pltffs. claim & def. may object in writing within 15 days. Court retains jurisdiction for implementation of this order; M/E No. 42,710; wet
1/20/77	Motion filed 20 Jan. 1977 by the Defendants, Robert R. Williams, Dan C. Alexander, Jr., et al., for Protective Order, with Certificate of Service. (Memo: Copy of this Motion forwarded on 20 Jan. 1977 to Judge Pittman for his action). W.J.O.
1/21/77	Plaintiffs' Response to defendant School Commissioners' Motion for Protective Order filed, Ajr
	Order entered that the plaintiffs will be required to pay reasonable expenses for travel, etc. in taking depositions in Birmingham, Alabama. Minute Entry No. 42,755 Ajr
	Order entered granting the immediate right to either party to take an immediate appeal; that this decree is a final judgment as to defendants, School Commissioners and the time limit under Rule 4(a) FRAP shall apply as of the date of this order, Minute Entry No. 42,754 Ajr

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUN. 9, 1975
WILLIAM J. O'CONNOR, CLERK

COMPLAINT

I.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1330 and 1343. The amount in controversy exceeds $10,000.00 exclusive of interest and costs. This is a suit in equity arising out of the Constitution of the United States, the First, Thirteenth, Fourteenth and Fifteenth Amendments, and 42 U.S.C. Secs. 1973, 1983 and 1985 (3).

II.

Class Action

Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 (a) and 23 (b)(2), Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of all black citizens of Mobile County, Alabama. All such persons have been, are being, and will be adversely affected by the defendants' practices complained of herein. There are common questions of law and fact affecting the rights of the members of this class, who are, and continue to be, deprived of the equal protection of the laws because of the election system detailed below. These persons are so numerous that joinder of all members is impracticable. There are questions of law and fact common to plaintiffs and the class they represent. The interests of said class are fairly and adequately represented by the named plaintiffs. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

III.

Plaintiffs

A. Plaintiff *Leila G. Brown* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Theodore.

B. Plaintiff *Mary Louise Griffin Cooley* is a black citizen of Mobile County, Alabama, over the age of 21 years.

C. Plaintiff *Joannie Allen Dumas* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Mount Vernon, Alabama.

D. Plaintiff *Elmer Joe Daily Edwards* is a black citizen of Mobile County, Alabama, over the age of 21 years.

E. Plaintiff *Rosie Lee Harris* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Saraland, Alabama.

F. Plaintiff *Hazel C. Hill* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Mobile, Alabama.

G. Plaintiff *Jeff Kimble,* is a black citizen of Mobile County, Alabama, over the age of 21 years.

H. Plaintiff *Frances J. Knight* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Theodore, Alabama.

I. Plaintiff *John W. Leggett* is a black citizen of Mobile County, Alabama, over the age of 21 years.

J. Plaintiff *Janice M. McAuthor* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Saraland, Alabama.

IV.

Defendants

A. Defendant JOHN L. MOORE is the Probate Judge of Mobile County. Defendant JOHN E. MANDEVILLE is the Circuit Clerk of Mobile County. Defendant THOMAS J. PURVIS is the Sheriff of Mobile County. These three officers, or persons appointed in their stead by the Register in Equity serve as the appointing Board for election officials (Title 17, Sections 120-26, *Code of Alabama* (1958)) and as the Board of Election Supervisors to certify election results (*id.*, Sections 139, 139(1), 199, 209, 344).

B. Defendants HOWARD E. YAEGER, COY SMITH AND G. BAY HAAS are members of the Mobile County Commission.

C. Defendants ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, AND HOMER L. SESSIONS are members of the Board of School Commissioners of Mobile County.

V.

Nature of Claim

A. The Mobile County Commission is the general supervisory agency of government for Mobile County. It holds the legislative power granted to counties and performs certain executive functions as well.

B. The County Commission consists of three (3) members, who run for numbered places and are elected at large. The only restriction, other than age, is that commissioner number one must be a resident of the City of Mobile and commissioner number two must be a non-resident. Act 181, 1957 Reg. Sess. All members are elected at the same time.

C. The Board of School Commissioners of Mobile County is composed of five members who are elected at large to six year terms. Two members were elected in 1970, three in 1972, two in 1974.

D. The City of Mobile has a population of 190,026, or about 60% of the County population (317,308). 1970 Census of Population, Vol. 1, Part 2, Table 10.

E. Mobile County has a black population of 102,383, or approximately 32% of the total. Of this total, 88% (88,361) live in the cities of Mobile and Prichard, which have only 73% of the total population of the county.

The Black population for each city is as follows:

	# of black	% black
Mobile	67,356	35.4
Prichard	21,005	50.5

F. According to the 1970 Census, 257,816 people (or 81% of the total population) live in the urbanized area in and around Mobile. 1970 Census of Population, Vol. 1, Part 2, Table 12.

G. The present system of electing members of the Mobile County Commission discriminates against black residents of Mobile and Prichard in that their concentrated strength is diluted and minimized by the larger white majority in other parts of the county.

H. The present system of electing members of the Board of School Commissioners of Mobile County discriminates against black residents of Mobile and Prichard in that their concentrated strength is diluted and minimized by the larger white majority in other parts of the county.

I. The present system of electing members of the Board of School Commissioners of Mobile County discriminates against the rural interests in the county by submerging their local strength in the county-wide urban majority.

VI.

Plaintiffs in the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the unconstitutional election system described herein.

WHEREFORE, plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiffs and the class they represent a declaratory judgment that the election system complained of herein violate the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973, 1983 and 1985 (3).

2. Grant plaintiffs and the class they represent an order enjoining the defendants, their agents, successors, attorneys and those acting in concert with them and at their direction from holding, supervising, or certifying the results of any election for the County Commission or the Board of School Commissioners of Mobile County under the present election system.

3. Order the reapportionment of the County Commission and Board of School Commissioners of Mobile County so that the voting strength of black citizens is not diluted, minimized or canceled out.

4. Award plaintiffs and the class they represent their costs in this action including an award of reasonable attorneys' fees.

5. Grant such other and further equitable relief as the Court may deem just and proper.

CRAWFORD, BLACKSHER & KENNEDY
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

By: _____
J. U. BLACKSHER

EDWARD STILL, ESQ.
321 FRANK NELSON BUILDING
BIRMINGHAM, ALABAMA 35203

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,

v. CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, et al.,
Defendants.

ORDER

The plaintiffs have advised the court that the Legislature has enacted a new system of electing members of the Board of School Commissioners of Mobile County, and the defendants, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, who have been made defendants individually and in their official capacity as School Commissioners of Mobile County, Alabama, should be dismissed as defendants and the cause of action against them dismissed on the plaintiffs' motion, without prejudice.

It is therefore ORDERED, ADJUDGED and DECREED that said defendants, and the cause of action against them as set out in the complaint, are hereby DISMISSED, without prejudice.

Done, this the 21st day of November, 1975.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
21st DAY OF NOVEMBER 1975
WILLIAM J. O'CONNOR, CLERK

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
DEC. 15, 1975
WILLIAM J. O'CONNOR, CLERK

PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS

Come now the Plaintiffs and move the Court to certify them as representatives of the class of black citizens of Mobile County, Alabama. There is now adequate evidence shown by the pleadings and discovery that:

1. The class is so numerous that joinder of all members of the class is impractical.

2. There are questions of fact and law common to all members of the class.

3. The named Plaintiffs are typical of the class insofar as their claims in this action and would fairly and adequately represent the interests of the class.

4. The actions of the Defendants in perpetuating the governmental structure of representation attacked in this action are generally applicable to all members of the class, thereby making appropriate final injunctive and declaratory relief.

Submitted by:

Edward Still
601 Title Building
Birmingham, Alabama 35203
205/323-6171

James H. Blacksher
Gregory B. Stein
1407 Davis Avenue
Mobile, Alabama 36603

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,

v. CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, et al.,
Defendants.

ORDER ON MOTION TO DISMISS

The plaintiffs, black citizens of the County of Mobile, seek to bring this action as a class action on behalf of themselves and on behalf of all other black persons similarly situated, pursuant to Rule 23(a) and Rule 23(b)(2), Federal Rules of Civil Procedure.

It is alleged that they, and all other such persons, have been, are being, and will be adversely affected by the defendants' practices complained of, to wit, they are and continue to be deprived of equal protection of the laws because of the election at large system of the County Commissioners to numbered places. It is claimed this discriminates against black residents of Mobile and Prichard in that their concentrated voting strength is "diluted and cancelled out by the white majority."

The plaintiffs seek the following relief: (1) a declaratory judgment that the election system violates the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973, 1983, and 1985(3); (2) issue an order enjoining the defendants, their agents, etc. from holding, supervising, or certifying the results of any election for the County Commission of Mobile County under the present at-large election system; (3) order the reapportionment of the County Commission of Mobile County so that the voting strength of black citizens is not diluted, minimized, or cancelled out; (4) award the plaintiffs costs and a reasonable attorney's fee; (5) grant such other and further equitable relief as the court may deem just and proper.

Jurisdiction is invoked pursuant to 28 U.S.C. § § 1331 and 1343.

The motion to dismiss the cause of action stated under 42 U.S.C. § 1985(3) is due to be granted.

In *Westberry* v. *Gilman Paper Co.*, 507 F.2d 206, 214 (1975), the Fifth Circuit summarized a 1985(3) cause of action as follows:

> "This requires that the complaint show that there was a conspiracy; that such a conspiracy be for the purpose of depriving an individual of the equal protection of the laws; that the co-conspirators acted in furtherance of their conspiracy, and that the plaintiff was injured in his person or property or actually deprived of a citizen's right or privilege. Second, as the Supreme Court noted in Griffin: [T]he language of [of 1985(3)] requiring intent to deprive of equal protection or equal privileges, and immunities means that there must be some racial or perhaps otherwise class based invidiously discriminatory animus behind the conspirators' action."[1]

Plaintiffs have not set out sufficient allegations of a conspiracy to meet this test. They only allege that the election system discriminates against them. [Complaint IV-E]. Therefore, insofar as the action is based on 42 U.S.C. § 1985(3), the complaint fails to state a cause of action and the motion to dismiss this cause of action as to all defendants in the complaint is well taken and is GRANTED.

The defendants' motion to dismiss the cause of action under the Voting Rights Act of 1965, 42 U.S.C. § 1973 is not well taken and the motion is DENIED as to all defendants.[2]

---

[1] See *Griffin* v. *Breckenridge*, 403 U.S. 88.

[2] See the amendment to the Act approved August 6, 1975: "Section 401. Section 3 of the Voting Rights Act of 1965 is amended by striking out 'Attorney General' the first three times it appears and inserting in lieu thereof the following 'Attorney General or, an aggrieved person." U.S. Code Congressional and Administrative News, P.L. 94-73, 89 Stat. 404.

Therefore, under 28 U.S.C. § 1343(4), this court has jurisdiction of all defendants.

Since this court has jurisdiction under § 1343(4), it is unnecessary to discuss the jurisdictional issue under 28 U.S.C. § 1331.[3] Therefore, motion of defendants as to the cause of action under § 1973 and the attack of the jurisdiction as to § 1343(4) is not well taken and is hereby DENIED.

The defendants' motion to strike attorneys' fees and the injunctive relief prayed for in paragraph V-2 is DENIED.[4]

Done, this the 29th day of December, 1975.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
29TH DAY OF DECEMBER, 1975
WILLIAM J. O'CONNOR, CLERK

[3] The complaint alleges an amount in controversy of $10,000 or more, but briefs claim the jurisdictional amount is based on a $10,000 loss to defendants rather than to the plaintiffs. For a good discussion of the right to proceed under § 1331 with less than the $10,000 jurisdictional amount, see *Cortright* v. *Resor*, 325 F. Supp. 797 (D.C. N.Y. 1971) at p. 808. The case was reversed for other reasons.

[4] See the amendment to the Act approved August 6, 1975. "Section 402. Section 14 of the Voting Rights Act of 1965 is amended by adding at the end thereof the following new subsection: (e) In any action or proceeding to enforce the guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of these costs." *Supra*, footnote 2.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JAN. 13, 1976
WILLIAM J. O'CONNOR, CLERK

LEILA G. BROWN, et al.,
Plaintiffs,

v.

CIVIL ACTION
No. 75-298

JOHN L. MOORE, et al.,
Defendants.

PRELIMINARY PRETRIAL ORDER

You are hereby ORDERED to confer with opposing counsel on or before January 28, 1976, and together prepare in writing and file with the court not lesss than 24 hours prior to the pretrial set on the 4th day of February, 1976, in this cause, in a JOINT DOCUMENT, the following:

FOR THE PLAINTIFF

1. A brief statement of the cause of action for each count which includes the theory of the count.

2. A brief summary of plaintiff's contentions of facts in support of his cause(s) of action.

FOR THE DEFENDANT

1. A brief statement of the defense(s) including the theory of each defense.

2. A brief summary of defendant's contentions of facts in support of his defense(s).

FOR THE INTERVENOR(S), THIRD PARTY PLAINTIFF(S), [DEFENDANTS], ETC.

1. A brief statement of your theory of interest, cause(s) of action, defense(s), etc.

2. A brief summary of facts in support of your legal theories.

Each of the parties will present to opposing counsel at the conference the matters set out above for incorporation in a joint document.

FOR ALL PARTIES

In addition, the joint document is to include the following:

1. All admitted or uncontested facts.
2. Each party's brief statement of contested facts.
3. Each party's statement of contested legal issues.

All of the above is to be incorporated in one document which is to be signed by all attorneys prior to the filing.

Done, this the 7th day of January, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

cc: J. U. Blacksher
Edward Still, Birmingham
James C. Wood

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DIST. COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
19TH DAY OF JANUARY, 1976
MINUTE ENTRY NO. 39815
WILLIAM J. O'CONNOR, CLERK
BY_____
DEPUTY CLERK

LEILA G. BROWN, et al.,
Plaintiffs,
v.

CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, et al.,
Defendants.

ORDER

The plaintiffs have filed a motion for an order certifying that they may maintain this action as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

The Court having considered the motion, oral argument and briefs of the parties certifies that the plaintiffs may maintain this action as a class action.

The plaintiff class for the purposes of injunctive relief under Rule 23(b)(2) F.R.Civ.P. is defined by the Court as all black persons who are now citizens of Mobile County, Alabama.

The Court finds that this class action complies with the requirements of Rule 23(a) and (b)(2) F.R.Civ.P. and that the named plaintiffs have the standing to raise the issues for the purpose of injunctive relief.

DONE at Mobile, Alabama, this 19th day of January, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
MAR. 1, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION TO ADD PARTIES DEFENDANT

Plaintiffs move the Court for an order making Robert Williams, Dan C. Alexander, Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as School Commissioners of Mobile County, Alabama, and the Board of School Commissioners of Mobile County, *qua* School Board, as parties defendants in this action, directing service of process upon them, allowing the attached Proposed Amended Complaint and setting this cause for immediate pretrial; and for grounds therefor show:

1. The above named individuals and officials were parties defendants to this action until this Court, on November 21, 1975, on information supplied by plaintiffs that the Legislature had enacted a system of single-member districts for electing the members of the School Board, dismissed the causes of action against them without prejudice.

2. On February 17, 1976 judgment was rendered in *Board of School Commissioners of Mobile County, Alabama v. John L. Moore, et al.,* Civil Action No. 96,204 in the Circuit Court of Mobile County finding that the above mentioned Act of the Legislature "is invalid and unconstitutional" and was declared void. This action was instituted by the proposed defendants. A copy of the subject Complaint and Judgment is attached hereto.

3. The aforementioned individuals and officials as defendants in this action filed responsive pleadings, propounded interrogatories to the plaintiffs and otherwise actively defended this action. There will be no prejudice to any party or delay occassioned to the disposition of this action by the addition of the aforementioned individuals, officials and School Board as defendants.

4. The jurisdiction of this court will not be impaired. Jurisdiction is invoked pursuant to 28 U.S.C. §§1343(4) and 1331. The causes of action arise from the violation of those rights secured by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §1973 and, as to the individuals and officials, by 42 U.S.C. §1983.

5. Plaintiffs seek relief in that the present system of at-large elections with numbered places for each of the five positions on the Board of School Commissioners of Mobile County unconstitutionally dilutes and cancels out the voting strength of the plaintiffs. A copy of the Proposed Amended Complaint is attached hereto.

WHEREFORE, plaintiffs pray this Court will issue an order joining as defendants Robert Williams, Dan C. Alexander, Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as members of the Board of School Commissioners of Mobile County, Alabama, and the Board of School Commissioners of Mobile County, Alabama, *qua* Board; directing the issuance of process, allowing the attached Proposed Amended Complaint, and setting this cause for immediate pretrial.

Respectfully submitted this 1st day of March, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 Davis Avenue
Mobile, Alabama 36603

By: _____
J. U. BLACKSHER
GREGORY B. STEIN
LARRY MENEFEE

EDWARD STILL, ESQUIRE
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Birmingham, Alabama 35203

JACK GREENBERG, ESQUIRE
CHARLES WILLIAMS, ESQ.
Suite 2030
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New York, N. Y. 10019

Attorneys for Plaintiffs

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
MAR. 8, 1976
WILLIAM J. O'CONNOR, CLERK

PROPOSED AMENDED COMPLAINT

I.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1343(3) and (4). The amount in controversy exceeds $10,000 exclusive of interest and costs. This is a suit in equity arising out of the Constitution of the United States, the First, Thirteenth, Fourteenth and Fifteenth Amendments, and 28 U.S.C. §§1973 and 1983.

II.

Class Action

Plaintiffs hereby adopt and incorporate by reference Section II. of the original Complaint.

III.

Plaintiffs

Plaintiffs hereby adopt and incorporate by reference Paragraphs A, B, C, D, E, G, H, I, and J of Section III. of the orginal Complaint.

IV.

Defendants

A. Plaintiffs hereby adopt and incorporate by reference Paragraph A of Section IV. of the original Complaint.

B. Defendants Howard E. Yeager and G. Bay Haas are members of the Mobile County Commission.

C. Defendants Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions are members of the Board of School Commissioners of Mobile County.

D. Defendant Board of School Commissioners of Mobile County is the general supervisory agency of the public schools for Mobile County. It holds the legislative power granted to it by the State of Alabama and performs certain executive and administrative functions.

V.

Nature of Claim

Plaintiffs hereby adopt and incorporate by reference Section V. of the original Complaint.

VI.

Plaintiffs hereby adopt and incorporate by reference the relief sought in Section VI of the original Complaint.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

By: _____
J. U. BLACKSHER

EDWARD STILL, ESQUIRE
SUITE 601—TITLE BUILDING
2030 THIRD AVENUE, NORTH
BIRMINGHAM, ALABAMA
35203

JACK GREENBERG, ESQUIRE
CHARLES WILLIAMS, ESQ.
SUITE 2030
10 COLUMBUS CIRCLE
NEW YORK, N.Y. 10019

Attorneys for Plaintiffs

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 6, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION FOR CONTINUANCE

Come now Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama, who are Defendants herein, and respectfully move this Honorable Court for a continuance of this cause which is presently set upon Your Honor's docket to be called for trial on Monday, July 19, 1976. This is a non jury case. As grounds for this motion Defendants would respectfully show unto Your Honor as follows:

1. These Defendants were Defendants in this case when it was originally filed. Thereafter these Defendants were dismissed from the case upon motion of the Plaintiffs. Thereafter, also upon motion of the Plaintiffs, these Defendants were again added as Defendants in the lawsuit. In the interim period of time during which these Defendants were not a part of the lawsuit numerous steps were taken in the lawsuit by the Court in moving the case towards trial, and numerous steps were taken by the Plaintiffs and the remaining Defendants in moving themselves
toward being prepared to go to trial with the case. These Defendants did not however make the same preparation because they were not at that time Defendants in the case, having been dismissed upon Plaintiffs' motion. Since being reinstated as Defendants in the case these Defendants have not had sufficient opportunity to fully prepare themselves to defend their position in the lawsuit.

2. This case was, at a time unknown to these Defendants, placed upon the trial docket to be called for trial on

July 19, 1976 and notice thereof was given to Plaintiffs' counsel and to counsel for the other Defendants, but notice of the trial setting was not given to these Defendants or their counsel. Counsel discovered the trial setting while reviewing the Court file and the docket sheet in the office of the Clerk of the Court. By reason of this circumstance, these Defendants have until recently been unaware of the trial setting and have not prepared themselves for trial; and sufficient time does not now remain to make adequate preparation for trial of the case on July 19, 1976.

3. The case of Bolden v. City of Mobile (Civil No. 75-297-P) is set upon the Court's docket to be called for trial on Monday, July 12. Counsel is advised by counsel for the Defendant in that case that counsel does not expect the trial of that case to be completed in the week of Monday, July 12 and expects that case to carry over into the week of July 19-23.

Wherefore, these Defendants respectfully request a continuance of this cause for a period of time sufficient to enable these Defendants to adequately prepare their defense, and that the case then be reset upon this Court's docket to be called for trial.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for
Robert R. Williams, Dan C.
Alexander, Jr., Norman J. Berger,
Ruth F. Drago, and Homer L.
Sessions, individually and in
their official capacities as the
Board of School Commissioners of
Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

Please be advised that these Defendants intend to call this motion to the attention of the Honorable Virgil Pittman as soon as it has been filed in the office of the Clerk of the Court, and would at that time request that they be heard upon the motion immediately.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for
Robert R. Williams, Dan C.
Alexander, Jr., Norman J. Berger,
Ruth F. Drago, and Homer L.
Sessions, individually and in
their official capacities as the
Board of School Commissioners of
Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 12, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION FOR DEFAULT JUDGMENT

Plaintiffs, through their undersigned counsel, move the Court for an Order, pursuant to Rule 55, Federal Rules of Civil Procedure, entering a default judgment against defendants Robert Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as School Commissioners of Mobile County, Alabama, and against the Board of School Commissioners of Mobile County. As grounds for their motion, plaintiffs would show as follows:

1. This action was filed by plaintiffs on June 9, 1975, and the above-named individuals and officials, against whom default judgment is sought, were served as parties defendant.

2. Said defendants filed a motion to dismiss the complaint and a motion to strike certain portions of the complaint on July 10, 1975, appearing through their counsel, Abram L. Philips.

3. On November 21, 1975, on information supplied by plaintiffs that the Alabama Legislature had enacted a system of single-member districts for electing members of the School Board, this Court dismissed each and every cause of action against the aforesaid defendants without prejudice.

4. Shortly thereafter, the Board of School Commissioners of Mobile County, Alabama, and Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions and Robert R. Williams, in their individual capacities and as members of said Board, filed an action in the Circuit Court of Mobile County, Alabama, attacking Act 1150, 1975 Regular Session of the Alabama Legislature, as being in violation of the Constitution of Alabama.

On February 17, 1976, judgment was rendered in *Board of School Commissioners of Mobile County, Alabama, et al.* v. *John L. Moore, et al.*, Civil Action No. 96,204, in the Circuit Court of Mobile County, finding the said Act 1150, which would have required the School Commissioners to be elected from single-member districts, to be "invalid and unconstitutional" and therefore void.

5. On or about March 1, 1976, plaintiffs herein filed a motion to add as parties defendant the aforesaid School Board and its members in their individual and official capacities. The Court granted the aforesaid motion on March 8, 1976.

6. On March 22, 1976, at the direction of the Clerk of this Court, the United States Marshal served on the defendant School Board and School Commissioners, and each of them, copies of the Clerk's notice of this Court's Order granting plaintiffs' motion to add them as parties defendant, plaintiffs' motion to add said defendants with attached amended complaint, the pretrial order dated February 4, 1976, the joint pretrial document filed January 28, 1976, the order on motion to dismiss entered December 29, 1975, and the motion to dismiss filed by the defendant County Commissioners on or about July 8, 1975.

7. Abram L. Philips, Jr., as counsel for the defendant School Board and School Commissioners, was timely served with notices of the several depositions of experts retained by plaintiffs and by the defendant County Commissioners, all of which depositions were taken after the School Board defendants were served with notice of their joinder. Counsel for the School Board defendants did not, however, attend or participate in said depositions. Mr. Philips was served with copies of all pleadings and other documents filed by plaintiffs after March 22, 1976.

8. However, the defendant School Board and School Commissioners have failed to plead or otherwise defend against the amended complaint served on their counsel on March 22, 1976.

9. The evidence of record in this action establishes, as a matter of law, prima facie proof that the present system of electing members of the Board of School Commissioners of Mobile County discriminates against black residents of Mobile County in that their concentrated strength is diluted and minimized by the larger white majority in the county, so that plaintiffs and the class they represent are entitled to the relief prayed for in their amended complaint, including a declaratory judgment that the system for electing members of the Board of School Commissioners of Mobile County violates their rights under the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973 and 1983.

a. The depositions of plaintiffs' expert witnesses, Dr. Cort B. Schlichting and Dr. Charles Cotrell, on file with this Court establish that the slating process or candidate selection process for Mobile County School Commissioners, namely the Democratic Party Primary, is not open on an equal basis to black citizens because the history of racial discrimination and the persistence of racially polarized voting severely dilutes the voting strength of plaintiffs and the class they represent. This Court can take judicial notice of the fact that since 1962, no less than four highly qualified black citizens of Mobile County have been defeated in the Democratic Primary as candidates for the School Board.

b. This Court can take judicial notice of the elected School Commissioners' unresponsiveness to the interest of black citizens as appears in the records of this Court, *Birdie Mae Davis* v. *Board of School Commissioners of Mobile County*, Civil Action No. 3003-63-H.

c. The action of the Legislature of Alabama in 1975 instituting a single-member district scheme for electing Mobile County School Commissioners conclusively establishes that the State of Alabama has

only a tenuous state policy supporting the use of multi-member districts.

d. This Court can take judicial notice of the fact that the existence of past racial discrimination precludes the effective participation of black citizens in the election system for the Mobile County Board of School Commissioners. See Plaintiffs' Proposed Findings of Fact and Conclusions of Law filed in this action.

e. The above proof of unconstitutional dilution of black citizens' voting strength with respect to the election of Mobile County School Commissioners is enhanced by the existence of a single large district by majority vote requirements, by the numbered-place system and by the lack of provision for at-large candidates running from particular geographical subdistricts. *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973)(en banc), *aff'd sub nom, East Carroll Parish School Board* v. *Marshall,* 96 S.Ct. 1083 (1976).

WHEREFORE, plaintiffs pray that the Court will grant their motion and thereupon enter a default judgment against defendants Board of School Commissioners of Mobile County, Alabama, and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as Board members, as follows:

(1) Declaring that the Alabama statute presently used to establish an at-large voting system for the election of members of the Mobile County Board of School Commissioners is unconstitutional;

(2) Enjoining John L. Moore, John E. Mandeville and Thomas J. Purvis, in their official capacities as the Board of Election Supervisors in Mobile County from certifying the results of any election or primary election for the members of the Board of School Commissioners of Mobile County (or any body succeeding said Board)

pursuant to or based on the at-large or numbered-place provisions of the present Alabama statute.

(3) Ordering the defendants and the plaintiffs to file a joint plan, or separate plans if unable to agree on a joint plan, for the election of School Commissioners from fairly apportioned single-member districts which will ensure equal representation for all citizens of Mobile County;

(4) Upon final court approval of a new election plan, ordering new elections for all Mobile County School Commissioners in the primaries and general elections to be held in Mobile County in 1978; and

(5) Following entry of a final order herein, taxing plaintiffs' costs and attorneys' fees against the defendant School Board and School Commissioners in amounts to be determined upon appropriate motion by plaintiffs.

Respectfully submitted this 12 day of July, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 Davis Avenue
Mobile, Alabama 36603

By: _____
J. U. BLACKSHER
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Attorneys for Plaintiffs

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[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 12, 1976
WILLIAM J. O'CONNOR, CLERK

SECOND MOTION FOR CONTINUANCE

Come now Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama, who are Defendants herein, and respectfully move this Honorable Court for a continuance of this cause which is presently set upon Your Honor's docket to be called for trial on Monday, July 19, 1976, and as grounds for this motion would respectfully show unto Your Honor as follows:

1. To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present election system provided by the law of Alabama for the election of the membership of the Mobile County School Board, which operates the Public School System of the County, is unconstitutional because it discriminates against certain citizens in violation of the United States Constitution. This present system of election provides for a Board of five members, each elected by a vote of the qualified electors of the county at large.

The election system complained of was not created by and is not maintained by these Defendants; they merely occupy the positions on the School Board by virtue of their election to said positions in the manner provided by state law. They have no power to change the system by any action of their own.

The election system is provided by state law. It exists in its present form by virtue of Acts previously passed by the State Legislature, and it can lawfully be changed only

by an amendment to the Constitution of the State of Alabama or Acts that may hereafter be passed by the Legislature, absent some judicial order imposing change if the Legislature does not itself make such change as may be necessary to provide a constitutional system, if indeed the present system is found to be unconstitutional.

Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Session) reapportioning the School Board into five single member districts. Passage of this Act by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants; and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause (and in essence to dismiss the School Board portion of the lawsuit) because said Act 1150 provided a constitutional system of electing the School Board. Receiving no objections from any of the Defendants, this Court granted the motion and dismissed these Defendants from the case.

Thereafter said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex parte and considered by this Court without these Defendants having an opportunity to be heard, the Court reinstated these Defendants as Defendants in this cause.

At the time of their reinstatement as Defendants these Defendants were totally unprepared to proceed immediately as parties to this cause, for reasons that are set out in more detail in additional grounds for this motion referred to hereafter. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants have expected and have been awaiting the Plaintiff to procure passage of another Act by the Legisla-

ture providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically defective. Having now perceived no further activity upon the part of the Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action, as a consequence of which there has been introduced into the Alabama House of Representatives, and is now under consideration by the Alabama House of Representatives designated as House Bill 1060, Regular Session 1976, a Bill which, when enacted, will reapportion the school board into five single member districts in a manner essentially identical to that previously provided by Act 1150 of the Regular Session 1975, upon the basis of which this Court earlier dismissed these Defendants from this cause and thereby terminated the School Board aspect of the case.

Upon the basis of these occurrences these Defendants respectfully suggest to this Honorable Court that it is both undesirable and unnecessary for the School Board aspect of this case to proceed to trial at this time; and again, respectfully move the Court for a continuance of this cause from the present trial setting of July 19, 1976.

2. Upon passage of Act 1150 by the 1975 Regular Session of the Legislature, and the subsequent dismissal of these Defendants from this cause because of the passage of said Act, these Defendants set aside all activity toward preparing a defense to this cause. The Plaintiffs, and the remaining Defendants however continued their preparation for trial of the cause. Numerous steps were taken in the cause by the Court in moving the case towards trial, and numerous steps were taken by the Plaintiffs and the remaining Defendants in moving themselves toward being prepared to go to trial with the case. These Defendants did not however make the same preparation because they were not Defendants in the case and did not anticipate having to go to trial. As the record will reveal, both the Plaintiffs and the other Defendants herein have laid the

ground work for presentation of positions based primarily upon the testimony of a number of expert witnesses who have been preparing themselves to testify at length, and whose preparation has included the compilation and analysis of a vast amount of technical and statistical data. These Defendants were prepared to undertake a similar defense, but upon being removed from the case as Defendants, they did not engage the services of qualified experts and did not pursue preparation of the necessary information to present a defense.

Since being reinstated as Defendants in this case upon motion of the Plaintiffs, these Defendants have not had sufficient opportunity to prepare themselves to defend their position in the lawsuit. Based upon the experience of the Plaintiffs and the other Defendants in this cause, a period of some four to six months would be required to permit the Defendants to prepare themselves to make an adequate defense. If this motion for continuance is not granted the Defendants will have been, by the motion of the Plaintiffs removing them from the lawsuit and the subsequent motion of the Plaintiffs adding them back as Defendants in the lawsuit, effectively prevented from making a defense in the lawsuit.

3. This case was, at a time unknown to these Defendants, placed upon the trial calender to be called for trial on July 19, 1976, and notice of the trial setting was given to Plaintiffs' counsel and to counsel for the other Defendants, but notice of the trial setting was not given to these Defendants or their counsel. Counsel for these Defendants discovered the trial setting while reviewing the Court file and the docket sheet in the office of the Clerk of the Court. By reason of this circumstance, these Defendants have until recently been unaware of the trial setting and have not prepared themselves for trial; and sufficient time does not now remain to make adequate preparation for trial of the case on July 19, 1976. Observation of the

notices of trial setting which are in the Court file will confirm that the notices were sent to all counsel except counsel for these Defendants. No criticism is directed to the Clerk of the Court or to the Court in this regard; this circumstance is simply pointed out as a matter of fact.

4. The case of Bolden v. City of Mobile (Civil No. 75-297-P) is set upon the Court's docket to be called for trial on Monday, July 12. Counsel for these Defendants is advised by counsel for the Defendants in that case that counsel does not expect the trial of that case to be completed in the week of July 12-16 and expects the case to carry over into the week of July 19-23.

5. Counsel representing the other Defendants in this cause have been consulted and have advised that they concur in this motion for a continuance of the entire cause. In the alternative, if the Court is disinclined to continue the entire cause these Defendants respectfully request the Court to sever the cause of action against these Defendants from the cause of action against the other Defendants and continue as a separate case only the cause of action against these Defendants.

WHEREFORE these Defendants respectfully request a continuance of this cause for a period of time sufficient to determine if the Legislature of the State of Alabama enacts House Bill 1060 referred to hereinabove, in which case it will not be necessary for this cause to go to trial in any event; and for a period of time sufficient for these Defendants to adequately prepare their defense if the Legislature does not enact House Bill 1060 and it becomes necessary for the School Board portion of this cause to be tried before this Court.

These Defendants respectfully request the opportunity to be heard by this Court on this motion; they request that at such hearing they be allowed to present the testimony of witnesses in support of this motion; and they request that at such hearing the proceeding be recorded by the Court Reporter.

PILLANS, REAMS, TAPPAN, WOOD, ROBERTS & VOLLMER

By _____
Abe Phillips, Attorneys for Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

Please be advised that these Defendants intend to call this motion to the attention of the Honorable Virgil Pittman as soon as it has been filed in the office of the Clerk of the Court, and would at that time request that they be heard upon the motion immediately.

PILLANS, REAMS, TAPPAN, WOOD, ROBERTS & VOLLMER

By _____
Abe Phillips, Attorneys for Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

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U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 12, 1976
WILLIAM J. O'CONNOR, CLERK

ANSWER TO AMENDED COMPLAINT

Come now the Defendants, the Board of School Commissioners of Mobile County and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as members of said Board, and, in answer to the named Plaintiffs' complaint, say:

FIRST DEFENSE

The complaint as amended fails to state a claim against these Defendants upon which relief can be granted.

SECOND DEFENSE

To the extent that this action is based upon 42 U.S.C. Section 1973 the complaint fails to state a claim upon, which relief can be granted since the complaint affirmatively shows that no Plaintiff is among those empowered to bring enforcement actions under any provision of the Voting Rights Act of 1965.

THIRD DEFENSE

To the extent that this action is based upon 28 U.S.C. Section 1331 there is a want of subject matter jurisdiction in this Court since it appears to a legal certainty that the claim of each class member is in reality for less than the requisite jurisdictional amount in controversy.

FOURTH DEFENSE

To the extent that this action is based upon 28 U.S.C. Section 1973 the complaint fails to state a claim upon which relief can be granted because that statute creates no new right

the violation of which is actionable, but instead only a new remedy to implement previously held rights.

FIFTH DEFENSE

To the extent that this action is against the Board of School Commissioners of Mobile County and is based upon a remedy inferred from the Constitution, cognizable under 28 U.S.C. Section 1331, the complaint fails to state a claim upon which relief can be granted.

SIXTH DEFENSE

To the extent that this action is against the Board of School Commissioners of Mobile County and is based upon 42 U.S.C. Section 1983, the complaint fails to state a claim upon which relief can be granted, because said Board is not a "person" within the intendment of that statute.

SEVENTH DEFENSE

I. Jurisdiction

Defendants admit that this Court has subject matter jurisdiction of this cause insofar as it is a claim against the said commissioners under 42 U.S.C. Section 1983, jurisdictionally premised upon 28 U.S.C. Section 1343. In all other respects the allegations of Section I of the complaint are denied.

II. Class Action

1. Defendants admit that the named Plaintiffs purport to represent a class composed of all black citizens of Mobile County, Alabama, but deny that this action may properly be maintained as a class action on behalf of such persons.

2. Defendants deny that blacks as such are adversely affected by any practices of Defendants.

3. Defendants deny that blacks are, or continue to be, deprived of the equal protection of the law in Mobile County,

Alabama with regard to the election of members of the Board of School Commissioners of Mobile County.

4. Defendants admit that the joinder of all members of the purported class would be impracticable.

5. Defendants deny that the named Plaintiffs may properly represent all black citizens of Mobile County. Defendants say, on the contrary, that the political ideas of the named Plaintiffs with respect to the issue in this case are not shared by all blacks in the county; that there is disparity among black citizens, as there is among white citizens, with respect to the form of governance of the Mobile County Public School System which is desired.

6. Defendants deny that they have acted or refused to act on grounds generally applicable to the purported class.

7. Defendants deny that injunctive or declaratory relief with respect to the purported class is proper.

8. Except as herein expressly admitted, Defendants deny all allegations of Section II of the complaint.

III. Plaintiffs

Defendants admit the allegations of Section II of the complaint.

IV. Defendants

1. Defendants admit the allegations of paragraphs A, B, and C, of Section IV of the complaint.

2. As to the allegations of paragraph D, Defendants admit that the Board of School Commissioners of Mobile County is the governing body of the Mobile County Public School System by virtue of, but only to the extent provided by, the Constitution of Alabama and statutes enacted from time to time by the Legislature of the State of Alabama. Pursuant to such authority, the Board performs certain executive and administrative functions and holds limited legislative powers. Plenary legislative authority over the affairs of the School System is vested in the legislature of the State of Alabama.

V. Nature of Claim

1. As to the allegations of paragraphs A and B, Defendants admit that the Mobile County Commission is the governing body of Mobile County by virtue of, but only to the extent allowed by, statutes enacted from time to time by the Legislature of the State of Alabama. Pursuant to such statutes, the commission performs certain executive and administrative functions and holds limited legislative powers. Plenary legislative authority over the affairs of the county is vested in the Legislature of the State of Alabama. The three county commissioners are elected at large to numbered places.

2. As to paragraph C Defendants admit that the Board is composed of five members elected at large to six year terms; and deny the remaining allegations of that paragraph.

3. As to paragraphs D, E and F Defendants do not have sufficient information to admit these allegations and for lack of such information must deny them and demand strict proof thereof.

4. Except as herein expressly admitted, Defendants deny all allegations of Section V of the complaint.

VI. Relief

Defendants deny the allegations of Section VI of the complaint and deny that the relief sought by the named Plaintiffs is necessary or proper.

VII. Defendants further deny every allegation of the complaint not expressly admitted by this answer.

EIGHTH DEFENSE

All aspects of the governance and operation of the Mobile County Public School System are subject to determination by the Legislature of the State of Alabama. In the exercise of its discretion, the Legislature has provided that the School System shall be governed by a Board of five persons and has provided

the method to be used in electing them. Under our federal constitutional system, the determination of such matters is committed to state government and its components for resolution. The system chosen by the Legislature does not unconstitutionally deprive any of the many identifiable segments of the county from equal access to the electoral process, or discriminate for or against any such segment, and the continued existence of such system should be permitted by the judicial branch of the United States government.

NINTH DEFENSE

The choice of the form of governance of the Public School Systems of this country is a political issue committed under our federal system to the states for resolution and, in the case of Mobile County, the issue has been resolved by the people of Alabama through their Constitution and by the Legislature of the State of Alabama through the enactment of statutes, providing for the form of governance that now exists.

TENTH DEFENSE

To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present election system provided by the law of Alabama for the election of the membership of the Mobile County School Board, which operates the Public School System of the County, is unconstitutional because it discriminates against certain citizens in violation of the United States Constitution. This present system of election provides for a Board of five members, each elected by a vote of the qualified electors of the county at large.

The election system complained of was not created by and is not maintained by these Defendants; they merely occupy the positions on the School Board by virtue of their election to said positions in the manner provided by state law. They have no power to change the system by any action of their own. The election system is provided by state law. It exists in its present

form by virtue of Acts previously passed by the State Legislature, and it can lawfully be changed only by an amendment to the Constitution of the State of Alabama or Acts that may hereafter be passed by the Legislature.

Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Session) reapportioning the School Board into five single member districts. Passage of this Act by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants; and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause, and in essence to dismiss the School Board portion of the lawsuit, because said Act 1150 provided a constitutional system of electing the School Board. Receiving no objections from any of the Defendants, this Court granted the motion and dismissed these Defendants from the case.

Thereafter said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex parte and considered by this Court without these Defendants having an opportunity to be heard, the Court reinstated these Defendants as Defendants in this cause.

At the time of their reinstatement as Defendants these Defendants were totally unprepared to proceed immediately as parties to this cause. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants have expected and have been awaiting the Plaintiffs to procure passage of another Act by the Legislature providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically defective. Having now perceived no further activity upon the part of the Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action, as a consequence

of which there has been introduced into the Alabama House of Representatives, and is now under consideration by the Alabama House of Representatives designated as House Bill 1060, Regular Session 1976, a Bill which, when enacted, will reapportion the School Board into five single member districts in a manner essentially identical to that previously provided by Act 1150 of the Regular Session 1975, upon the basis of which this Court earlier dismissed these Defendants from this cause and thereby terminated the School Board aspect of the case.

ELEVENTH DEFENSE

The relief sought by Plaintiffs in this cause ought not to be granted because, in order for any court ordered single member district plan to be imposed that would avoid the existence of a School Board without electoral responsibility and consequent deprivation of due process and equal protection of law, it would be necessary to change the form of governance of the School System that has heretofore been validly and properly enacted by the Legislature of Alabama. The choice of a form of governance for the Public School Systems of this country is a function which our federal constitution entrusts to state government and its components, and the imposition of a different form by a United States Court would violate established constitutional principles of comity and federalism.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for
Defendants
P. O. Box 8158
Mobile, Alabama 36608

[Certificate of Service Omitted in Printing]

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U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 13, 1976
WILLIAM J. O'CONNOR, CLERK

RESPONSE TO MOTION FOR DEFAULT JUDGMENT

Come now Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama, who are Defendants herein, and respectfully make this response to the Motion for Default Judgment filed in this cause on July 12, 1976:

1. On July 12, 1976 these Defendants filed an answer to the Plaintiffs' Complaint as amended, containing eleven separate defenses.

2. Contrary to the averments of the Motion for Default, these Defendants have sought to defend against the Plaintiffs' Complaint, and on July 6, 1976 filed a Motion for Continuance in an effort to obtain sufficient time to prepare an adequate defense; something that has been denied them as more specifically referred to in paragraph (4) of this response. That motion being denied by the Court, on July 12, 1976 these Defendants filed a Second Motion for Continuance in a further effort to obtain sufficient time to prepare an adequate defense.

3. The burden of proof of unconstitutionality is upon the Plaintiffs; *White* v. *Regester*, 412 U.S. 755, 766 (1973). The evidence now of record, even unrebutted by the Defendants as it now is, does not acquit that burden.

(a) Multimember district schemes are not per se unconstitutional; *Zimmer* v. *McKeithen*, 485 F.2d. 1297 (5th Cir. 1973, en banc); *Nevett* v. *Sides*, F.2d. (5th Cir. June 8, 1976).

(b) The evidence of record does not establish that the statute establishing the present system of electing the members of the School Board has a "racially discriminatory purpose"; *Washington* v. *Davis,* U.S. , 44 U.S.L.W. 4789 (U.S. June 7, 1976).

(c) The evidence of record does not establish that the present system of electing members of the School Board operates to "dilute" the voting strength of the Plaintiff class, as such "dilution" has been defined by the courts; *Zimmer* v. *McKeithen,* supra; *Nevett* v. *Sides,* supra; and *Rev. Charles H. Nenett* v. *Lawrence G. Sides, et al.,* C.A. 73-P-529-S Northern District of Alabama (Order of June 11, 1976). It has *not* been established that blacks in Mobile County lack access to the process of slating candidates. It has *not* been established that the School Board is unresponsive to the particularized interests of blacks in the county. It has *not* been established that the present system of electing members of the School Board is the product of a tenuous state policy underlying a preference for multi-member or at-large districting. It has *not* been established that past discrimination in general precludes the effective participation of blacks in the election system. None of these *primary* factors have been established!

(d) Before the Court can fashion relief, it must first have found a constitutional violation; *Dallas County* v. *Reese,* 421 U.S. 477 (1975).

4. To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present election system provided by the law of Alabama for the election of the membership of the Mobile County School Board, which operates the Public School System of the County, is unconstitutional because it discriminates against certain citizens in violation of the United States Constitution. This present system of election provides for a Board of five members, each elected by a vote of the qualified electors of the county at large.

The election system complained of was not created by and is not maintained by these Defendants; they merely occupy the positions on the School Board by virtue of their election to said positions in the manner provided by state law. They have no power to change the system by any action of their own. The election system is provided by state law. It exists in its present form by virtue of Acts previously passed by the State Legislature, and it can lawfully be changed only by an amendment to the Constitution of the State of Alabama or Acts that may hereafter be passed by the Legislature.

Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Session) reapportioning the School Board into five single member districts. Passage of this Act by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants; and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause (and in essence to dismiss the School Board portion of lawsuit) because said Act 1150 provided a constitutional system of electing the School Board. Receiving no objections from any of the Defendants, this Court granted the motion and dismissed these Defendants from the case.

Thereafter said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex parte and considered by this Court without these Defendants having an opportunity to be heard, the Court reinstated these Defendants as Defendants in this cause.

At the time of their reinstatement as Defendants these Defendants were totally unprepared to proceed immediately as parties to this cause. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants had expected and had been awaiting the Plaintiffs to procure passage of another Act by the Legislature providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically

defective. Having perceived no further activity upon the part of the Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action, as a consequence of which there has been introduced into the Alabama House of Representatives, and is now under consideration by the Alabama House of Representatives designated as House Bill 1060, Regular Session 1976, a Bill which, when enacted, will reapportion the School Board into five single member districts in a manner essentially identical to that previously provided by Act 1150 of the Regular Session 1975, upon the basis of which this Court earlier dismissed these Defendants from this cause and thereby terminated the School Board aspect of the case.

Upon passage of Act 1150 by the 1975 Regular Session of the Legislature, and the subsequent dismissal of these Defendants from this cause because of the passage of said Act, these Defendants set aside all activity toward preparing a defense to this cause. The Plaintiffs, and the remaining Defendants however continued their preparation for trial of the cause. Numerous steps were taken in the cause by the Court in moving the case towards trial, and numerous steps were taken by the Plaintiffs and the remaining Defendants in moving themselves toward being prepared to go to trial with the case. These Defendants did not however make the same preparation because they were not Defendants in the case and did not anticipate having to go to trial. As the record will reveal, both the Plaintiffs and the other Defendants herein have laid the ground work for presentation of positions based primarily upon the testimony of a number of expert witnesses who have been preparing themselves to testify at length, and whose preparation has included the compilation and analysis of a vast amount of technical and statistical data. These Defendants were desirous of undertaking a similar defense, but upon being removed from the case as Defendants, they did not engage the services of qualified experts and did not pursue preparation of the necessary information to present a defense.

Since being reinstated as Defendants in this case upon motion of the Plaintiffs, these Defendants have not had sufficient opportunity to prepare themselves to defend their

position in the lawsuit. For this reason, on July 6, 1976 these Defendants filed a Motion for Continuance, and on July 12, 1976 a Second Motion for Continuance.

In the meantime this case was, at a time unknown to these Defendants, placed upon the trial calendar to be called for trial on July 19, 1976, and notice of the trial setting was given to Plaintiffs' counsel and to counsel for the other Defendants, but notice of the trial setting was not given to these Defendants or their counsel. Counsel for these Defendants discovered the trial setting while reviewing the Court file and the docket sheet in the office of the Clerk of the Court. By reason of this circumstance, these Defendants have until recently been unaware of the trial setting and have not fully prepared themselves for trial.

At the same time the trial setting was discovered, counsel also discovered and became consciously aware that an Amended Complaint had been filed by the Plaintiffs, to which no motion or answer had been filed in behalf of these Defendants; following which counsel began preparation of the answer in behalf of these Defendants that was filed in this Court on July 12, 1976.

Wherefore, these Defendants respectfully urge to this Court that justice cannot be served by the granting of a Default Judgment against these Defendants; and, therefore, respectfully urge this Court to deny the Motion for Default Judgment.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By_____

Abe Philips, Attorneys for
Defendants
P.O. Box 8158
Mobile, Alabama 36608

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DIST COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 20, 1976
WILLIAM J. O'CONNOR, CLERK

LEILA G. BROWN, et al.,
Plaintiffs,

v.

JOHN L. MOORE, individually and in his capacity as Probate Judge of Mobile County, et al.,
Defendants.

CIVIL ACTION NO. 75-298-P

PRELIMINARY PRETRIAL ORDER

You are hereby ORDERED to confer with opposing counsel on or before July 28, 1976, and together prepare in writing and file with the court by 5:00 p.m. on July 30, 1976, for the pretrial set on the 2nd day of August, 1975, at 11:00 a.m. in this cause, in a JOINT DOCUMENT, the following:

FOR THE PLAINTIFF

1. A brief statement of the cause of action for each count which includes the theory of the count.

2. A brief summary of plaintiff's contentions of facts in support of his cause(s) of action.

FOR THE DEFENDANT

1. A brief statement of the defense(s) including the theory of each defense.

2. A brief summary of defendant's contentions of facts in support of his defense(s).

FOR THE INTERVENOR(S), THIRD–PARTY PLAINTIFF(S), [DEFENDANTS], ETC.

1. A brief statement of your theory of interest, cause(s) of action, defense(s), etc.

2. A brief summary of facts in support of your legal theories.

Each of the parties will present to opposing counsel at the conference the matters set out above for incorporation in a joint document.

FOR ALL PARTIES

In addition, the joint document is to include the following:

1. All admitted or uncontested facts.
2. Each party's brief statement of contested facts.
3. Each party's statement of contested legal issues.

All of the above is to be incorporated in one document which is to be signed by all attorneys prior to the filing.

Done, this the 14th day of July, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

cc: J.U. Blacksher
Edward Still, Birmingham
Jack Greenberg, James M. Nabrit, III, and Charles E. Williams, III
Abe Philips
James C. Wood
Ralph Kennamer

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 29, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION TO STRIKE

Plaintiffs, through their undersigned counsel, move the Court to strike from the answer to amended complaint filed on or about July 12, 1976, by defendants Board of School Commissioners of Mobile County and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, the following allegations on pages 7 and 8 thereof:

> Passage of [Act No. 1150 of the 1975 Regular Session] by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants, and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause, and in essence to dismiss the School Board portion of the lawsuit, because said Act 1150 provided a constitutional system of electing the School Board. . . .
>
> . . .
>
> . . . Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants have expected and have been awaiting the Plaintiffs to produce passage of another Act by the Legislature providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically defective. . . Having now perceived no further activity upon the part of Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action. . . .

Plaintiffs further move that substantially similar allegations be stricken from pages 2-3 of the aforesaid defendants' second motion for continuance, filed on or about July 12, 1976, and from pages 3-4 of the aforesaid defendants' response to motion for default judgment filed on or about July 13, 1976. As grounds for their motion, plaintiffs would show unto the Court as follows:

1. Rule 11, Federal Rules of Civil Procedure, provides:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that, it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this Rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

2. The record in this cause and the attached affidavit of undersigned counsel for plaintiffs show that the aforesaid allegations of defendants (except for that which alleges that plaintiffs moved this Court to dismiss these defendants) are untrue and that counsel for defendants should have known they were untrue.

3. In fact, Act No. 1150 of the 1975 Regular Sessions was introduced by Representative Cain J. Kennedy of Prichard without the cooperation or assistance of plaintiffs herein, plaintiffs' counsel, the Non Partisan Voters League or John L. LeFlore, and independent of them. It is true that Representative Kennedy was a member of the law firm of undersigned counsel at the time he introduced the bill, but Representative Kennedy was acting in his capacity as a Representative of the people of Alabama and without the cooperation or collusion of undersigned counsel or other lawyers in his firm. In fact, Representative Kennedy completely severed his relationship with undersigned counsel's law firm on October 1, 1975, before said Act 1150 was enacted by the Legislature of Alabama.

4. While it is true, as reflected in this Court's order of November 21, 1975, that the School Board defendants were dismissed without prejudice upon the oral motion of plaintiffs' counsel, this Court knows, as does counsel for the defendants, that said oral motion was based on the mootness of plaintiffs' attack on the then superseded form of electing school commissioners, and was in no way intended to express approval or disapproval of the constitutionality of the electoral system established by Act No. 1150.

5. There is absolutely no basis for defendants' allegation that they had reason to expect plaintiffs would subsequently procure passage of another act by the Legislature of Alabama.

Not only were plaintiffs not responsible for the introduction or passage of Act No. 1150, but there was never any communication between plaintiffs and defendants or between their counsel which gave plaintiffs or their counsel any notion of the alleged expectations. Thus, this allegation by defendants is patently untrue and uncalled for.

WHEREFORE, Plaintiffs pray that the Court will grant their motion and strike the above referenced allegations from the answer, second motion for continuance and response to motion for default judgment filed by defendants Board of School Commissioners of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, as sham and false.

Respectfully submitted this 27th day of July, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

BY: _____
J. U. BLACKSHER
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NEW YORK, N. Y. 10019

Attorneys for Plaintiffs

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

AFFIDAVIT

STATE OF ALABAMA
COUNTY OF MOBILE } ss:

J. U. Blacksher, Esquire, being duly sworn deposes and says as follows:

I am one of the attorneys representing plaintiffs in the above styled action. This affidavit is submitted in support of plaintiffs' motion to strike certain allegations from the answer, second motion for continuance, and response to motion for default judgment filed by defendants Board of School Commissioners of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions. Act No. 1150 of the 1975 Regular Session was introduced by Representative Cain J. Kennedy of Prichard, Alabama. At the time he introduced the bill that subsequently became Act No. 1150, Mr. Kennedy was a partner in my law firm. However, Mr. Kennedy did not consult me about the bill before he filed it, nor did any of the plaintiffs or their counsel participate in any way in the formulation of the electoral plan that was proposed by Mr. Kennedy, who was acting independent of his relationship with my law firm and in his capacity as a Representative of the people of Alabama. Mr. Kennedy has never appeared as counsel of record for plaintiffs in this action. In any event, Representative Kennedy completely severed his relationship with my law firm on October 1, 1975, well before Act 1150 was passed and the School Board defendants dismissed from this action.

2. This Court is aware that I proposed dismissal of the School Board defendants from this action after Act 1150 was passed not on the basis that the electoral system provided by Act 1150 was constitutional but on the basis that its passage made plaintiffs' attack on the superseded electoral system a moot question. Plaintiffs in this action in no way procured the passage of Act 1150 of the 1975 Regular Session, and there is

absolutely no factual basis for defendants to allege that they had any right to expect plaintiffs to procure passage of another act to replace Act 1150 after it was declared void. Not only were plaintiffs and counsel in no position to procure passage of another act, particularly in view of the fact that they were actively engaged in this litigation, but no such expectations were ever communicated to us by School Board members or by their counsel. There is, therefore, absolutely no reason for allowing the defendants to defend their delay and default in this action on allegations that plaintiffs and their counsel were somehow responsible for said delay and default.

J. U. BLACKSHER
[Subscription Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 30, 1976
WILLIAM J. O'CONNOR, CLERK

SUPPLEMENTAL JOINT PRETRIAL DOCUMENT RELEVANT TO MOBILE COUNTY SCHOOL BOARD

I. PLAINTIFFS' CAUSES OF ACTION

1. Plaintiffs assert essentially one cause of action: that the present system of at-large elections for the five-member Board of School Commissioners of Mobile County effectively abridges plaintiffs' rights to vote and participate in the political process relating to the selection of School Commissioners guaranteed them by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, all in violation of 42 U.S.C. §§ 1973 and 1983.

2. Plaintiffs contend that the present at-large election system, coupled with the historical and social factors of race relations from the era of slavery to the present, for all practical purposes has excluded the black citizens of Mobile County. The plaintiff class lacks access to the political process, and their vote is substantially diluted.

3. Plaintiffs ask the Court for the following relief:

a. A declaratory judgment that the present system for electing the Board of School Commissioners of Mobile County violates the Constitution of the United States and 42 U.S.C. §§ 1973 and 1983.

b. A preliminary and permanent injunction enjoining the defendants and others acting at their direction or in concert with them from holding, supervising or certifying the results of any election for the Board of School Commissioners of Mobile County under the present at-large elec-

tion system and ordering the reapportionment of the Board of School Commissioners into racially nondiscriminatory single-member districts.

c. An award to plaintiffs of their costs in this action, including an award of reasonable attorneys' fees.

II. PLAINTIFFS' CONTENTIONS OF FACT

1. The Board of School Commissioners of Mobile County is composed of five members elected at-large for staggered six year terms. These are partisan elections with majority vote-runoff requirements for the party primaries. There are no residency requirements and the candidates run for numbered positions.

2. Four well-qualified black candidates have sought election to the school board, Dr. E. B. Goode in 1962, Dr. W. L. Russell in 1966, Ms. Jackie Jacobs in 1970 and Mrs. Lonia Gill in 1974. They each received overwhelming support in the black community and virtually no support in the white community. All of these candidates were defeated in runoff elections by white candidates. Similar effects can be seen when a white candidate receives strong support in the black community. Ms. Gerre Koffler was defeated in 1972 in a contest heavy with racial campaigning.

3. Mobile County has a total population of 317,308, of whom 32%, or 102,383, are black. Certain areas of Mobile County are almost totally devoid of black residents, while other areas of the County are virtually all-black. Segregated housing patterns have resulted in concentrations of black voting power.

4. Mobile and the State of Alabama have had a protracted history of racial discrimination in voting. Beginning in the early part of this century, many efforts have been made to disenfranchise black voters. Disenfranchisement has been accomplished by numerous devices, including poll taxes, interpretation and "literacy" tests, and all-white primaries. They succeeded in completely excluding blacks from the political

process. Virtually every barrier to black voter particiption in the governmental process has been struck down only with the assistance of federal legislation and the federal courts.[1] Plaintiffs intend briefly to review the early history of black disenfranchisement through the testimony of Dr. Melton McLaurin, Associate Professor of History, University of South Alabama. Barriers of voting and participation in the political process since World War II will also be reviewed by Dr. McLaurin and by other witnesses.

5. The long-standing history of public and private racial discrimination in Mobile and the State of Alabama and the civil rights activities of the past two decades have increased racial tension within the electorate and has caused a high racial polarization of the vote when issues or candidates have had identifiable racial appeal. This racial polarization makes the present at-large system for electing School Board members an effective barrier to the election of blacks and to the full representation of black community interests. Plaintiffs will present evidence of this polarization primarily through the testimony of their expert political scientist, Dr. Charles Cotrell. Dr. Cotrell will analyze the results of studies being conducted by plaintiffs of selected elections. Additionally, Dr. James Voyles may be questioned about the methods used and the conclusions he reached in his dissertation on Mobile Politics, which describes racial polarization of the electorate in this area during the 1960's. Other evidence of racial polarization will be published appeals to racial interests of the electorate.

6. The dilution of black voter strength is further evidenced by the historical and ongoing unresponsiveness of local government officials to the needs of the black community. Such unresponsiveness is shown by the following facts, among others:

a. Black citizens of Mobile have been forced to resort to the federal courts for relief from a wide range of racial discrimination in local government. E.g., *Davis* v. *Board of*

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[1] E.g., *Davis* v. *Schaell*, 81 E. Supp., 872 (S.D. Ala. 1948); *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), aff'd 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215.

School Commissioners of Mobile County, Civil Action No. 3003-63-H (school desegregation); *Allen* v. *City of Mobile,* Civil Action No. 5409-69-P (police department discrimination); *Preston* v. *Mandeville,* Civil Action No. 5059-68-H (jury discrimination); *Anderson* v. *Mobile County Commission,* Civil Action No. 7388-72-H (employment discrimination in county government). Plaintiffs contend that, had the political process been fully open to them and their voting strength not diluted, federal litigation would not have been necessary in order for them to obtain their constitutional rights.

b. Mobile County schools were strictly segregated by race until sometime after *Davis* v. *Board of School Commissioners of Mobile County,* Civil Action No. 3003-63-H, was commenced in this Court in 1963. The record in *Davis, supra,* is itself the strongest possible evidence of black Mobilians' dissatisfaction with the policies of the county-wide School Board and the Board's refusal to respond voluntarily to black community interests. The school desegregation case has been to the Fifth Circuit at least fourteen times and to the Supreme Court twice. Even so, today there are still many unresolved controversies pending in *Davis,* including a pending motion by the black plaintiffs for further relief in both the student attendance and teacher assignment areas.

7. Both the history and practice supporting the present form of government reflects no state interest in its maintenance. There is a wide variation in the types of governments used in the school districts in the State. Indeed the passage in the 1975 Alabama Legislature of Act No. 1150 creating five single-member districts is clear evidence of no state policy supporting the present at-large system.

8. The creation of single-membered districts would substantially enhance black participation in School Board government. As evidenced by recent legislative reapportionment in the statewide case of *Sims* v. *Amos,* the election of black officials would be greatly facilitated by the institution of single-member districts.

FOR THE DEFENDANTS

DEFENSES, THEORIES OF DEFENSE AND FACTUAL CONTENTIONS IN SUPPORT THEREOF

1. Defense: The complaint fails to state a claim upon which relief can be granted.

Theory of the Defense: This action is filed against the Board of School Commissioners of Mobile County and against the individual members of the Board, seeking an Order of the Court declaring that the election system under which the members of the Board are elected violates certain sections of the United States Constitution and of the United States Code and seeking an Order of the Court reapportioning the membership of the Board. The existence of the Board of School Commissioners of Mobile County is provided for by the Constitution of the State of Alabama and various acts of the Legislature of Alabama pursuant thereto. The members of the Board of School Commissioners of Mobile County have no statutory authority, nor any authority or power from any other source, to prescribe, require, alter, change, or amend, or to regulate in any way the form or manner of existence of the Board of School Commissioners of Mobile County, or the form or manner in which members are from time to time elected to the Board. In like manner, the Judge of Probate of Mobile County and the other Defendants in this action have no power or authority from any source to regulate or effect in any way the manner in which members are elected to the Board of School Commissioners of Mobile County. Only the people of the State of Alabama by constitutional amendment, or the Legislature of the State of Alabama by legislative act, and not the Defendants in this action, have the power under the Constitution and the laws of the State of Alabama to make the changes in the manner of the election of the members of the Board of School Commissioners of Mobile County as are sought by way of relief in this action.

Contentions of fact in support of the defense: Defendants will call upon the Court to take judicial knowledge of the

provisions of the Constitution of the State of Alabama and the Acts of the Legislature of the State of Alabama providing for the existence of the Board of School Commissioners of Mobile County. A summary of these provisions is as follows:

Alabama was admitted to the Union as a state in 1819. The Act of Congress of March 2, 1819 tendering to the inhabitants of the Alabama territory admission to the Union, is set out in 3 U.S. Statutes At Large 489.

On January 10, 1826, the Alabama Legislature approved legislation providing for the establishment and maintenance of public schools in Mobile County and set up a Board of Commissioners denominated at that time as the "Mobile School Commissioners", constituting it as a body corporate with full power and authority to establish, maintain and regulate schools in the County. This was the first provision for a "public" school system in the State of Alabama. This Act is found in the Acts of Alabama, 1825-26, page 35. This Act provided for not less than thirteen nor more than twenty-five Commissioners to be elected from the County at-large for terms of five years, tying such elections and the exact number of Commissioners to be selected from time to time to statutes providing for the election of representatives to a then existing General Assembly.

In 1836 by a further Act of the Legislature (Acts of Alabama, 1836, page 43) the number of Commissioners was specifically fixed at thirteen and the term of office was reduced from five to three years. This Act continued to provide for the election of the Commissioners by general election from the county at-large.

In 1854, twenty-eight years after establishment of the Public School System for the County of Mobile, the Legislature of the State of Alabama passed the necessary legislation to set up the first public school system for the remainder of the state (Acts of Alabama, 1853-54, page 8). The prior existence for some twenty-eight years of the separate public school system in Mobile County under the governance of the Mobile School Commissioners, a public body corporate, was recognized in the

Act establishing the school system for the remainder of the state by the following provision which appears as Section 2 of Article VI of the Act of February 15, 1854:

> "As the County of Mobile now has established a public school system of its own, the provisions of this Act shall apply to the County, only so far as to authorize and require its school commissioners to draw the portion of the funds to which that county will be entitled under this Act and to make the reports of the superintendent herein required."

In 1857 the settled policy of taking Mobile County out from under the general scheme of public school legislation was written into the Constitution of Alabama of 1875 as Section 11 of Article XII; the same constitutional provision would subsequently be carried forward without substantial change into the Constitution of 1901, as Section 270 of Article XIV.

On February 15, 1976 the Legislature passed an Act (Acts of 1876, page 363) establishing the number of Commissioners as nine; providing for their election at-large on a countywide basis; but prescribing that at least two of the nine must reside within six miles of the courthouse of the county. This Act provided for staggered six year terms with three Commissioners elected every two years.

Upon adoption of a new state Constitution in 1901, the settled policy of taking Mobile County out from under the general scheme of public school legislation and recognizing the existence of a separate school system, separate and a part from the remainder of the state, was, as aforesaid, written into the Constitution of 1901 as Section 270 of Article XIV.

On August 22, 1919 the Legislature passed an Act (Local Acts 1919, page 73) establishing a Board of School Commissioners composed of five members elected by the voters of the county at-large for staggered six year terms with election every two years (thus two Commissioners are elected, then two years later two more Commissioners are elected, then two years later one Commissioner is elected, then the rotation begins again). The same system has endured since that time, and is the system that presently obtains.

In October 1975 the Legislature of Alabama passed an Act providing for a Board of School Commissioners of five members, to be elected one each from five separate districts within the county. The Act provided for staggered four year terms with elections to be held every two years (three Commissioners would be elected, then two years later two Commissioners would be elected, then the rotation begins again). This Act also provided that each member must be a bona fide resident of the district from which he is elected. This Act was declared unconstitutional and void on February 17, 1976 by a Decree of the Circuit Court of Mobile County because of a technical defect, in that there had been a material change between the Act as passed by the Legislature and the notice thereof that had been published in an effort to comply with the requirements of Section 106 of the Constitution of Alabama.

2. Defense: To the extent that this action is based upon 42 U.S.C. Section 1973 the complaint fails to state a claim upon which relief can be granted because the complaint affirmatively shows that no Plaintiff is among those empowered to bring enforcement actions under any provision of the Voting Rights Act of 1965; and because the Defendants are not subject to the provisions of Section 1973.

Theory of the defense: The Defendants are neither a "state" or "political subdivision" of a state. They are not therefore, by the very terms of 42 U.S.C. Section 1973 subject to the provisions of that statute. Further, the Defendants have no capacity to impose any qualification or prerequisite to voting by any citizen in the State of Alabama in connection with the election of the membership of the Board of School Commissioners of Mobile County. Further, the complaint affirmatively shows that none of the Plaintiffs are among those empowered to bring enforcement actions under any provision of the Voting Rights Act of 1965.

Contentions of fact in support of the defense: This is not a defense based upon factual contentions, but upon the provisions of 42 U.S.C. Section 1973 itself and decisions construing that statute.

3. Defense: To the extent that this action is based upon 28 U.S.C. Section 1331 there is a lack of subject matter jurisdiction in this Court since it appears to a legal certainty that the claim of each class member is in reality for less than the requisite jurisdictional amount in controversy.

Theory of the defense: The theory of the defense is adequately stated in the statement of the defense itself.

Contentions of fact in support of this defense: This defense rests factually upon the showing that it appears to a legal certainty from the allegations of the complaint as a whole, as amended, that the claim of each member is in reality for an amount less than the requisite jurisdictional amount in controversy.

4. Defense: To the extent that this action is against the Board of School Commissioners of Mobile County and is based upon 42 U.S.C. Section 1983, the complaint fails to state a claim upon which relief can be granted because the Board of School Commissioners of Mobile County is not a "person" within the intendment of that statute.

Theory of the defense: The theory of the defense is adequately stated in the statement of the defense itself.

Contentions of fact in support of the defense: This defense is made as a matter of law and does not rest upon factual contentions.

5. Defense: The present system of electing members of the Board of School Commissioners of Mobile County does not discriminate against "black residents" of Mobile and Prichard and does not discriminate against the "rural interests" of Mobile County.

Theory of the defense: The theory of this defense is simply that the present system of electing the members of the Board of School Commissioners of Mobile County does not discriminate against the Plaintiffs, because the present system of election was not adopted with a racially discriminatory purpose and because

the indicia of discriminatory effect that would support a finding that there exists a "dilution" of the Plaintiffs' political strength are not present.

Contentions of fact in support of the defense: The constitutional and legislative history of the Board of School Commissioners of Mobile County establishes the fact that the present system was not devised nor adopted for a discriminatory purpose. The evidence will further show that the indicia of dilution referred to in *Zimmer* v. *McKeithen,* are not present. There is no lack of access to such process of slating candidates as may exist in Mobile County; there is no unresponsiveness to particularized interests of the Plaintiffs; there is no tenuous state policy underlying a preference for multi-member or at-large districting; and the Plaintiffs are not precluded from effective participation in the election system as a consequence of any occurrence of past discrimination.

6. Defense: The Plaintiffs do not constitute an identifiable segment of the population.

Theory of the defense: As an initial step the Plaintiffs have the burden of proving that they constitute under the present facts an identifiable class for Fourteenth Amendment purposes. Merely because the Plaintiffs are black does not constitute them as an identifiable class.

Contentions of fact in support of the defense: This is primarily a legal defense based upon Court decisions; from the factual standpoint however, it is the Defendants' position that the facts simply do not support the contention that the Plaintiffs are an identifiable segment of the population.

7. Defense: There is no constitutional right to a black electorial district.

Theory of the defense: No one has a constitutional right to a politically safe black district.

Contentions of fact in support of the defense: This defense does not rest upon fact but is a legal defense dependent upon judicial decisions.

DEFENDANTS' STATEMENT OF CONTESTED FACTS

It is contested that this action should proceed as a class action and it is contested that the Plaintiffs comprise an identifiable segment of the population of Mobile County. It is contested that the Plaintiffs are being or will be adversely effected by the present system of election or that the Plaintiffs are deprived of the equal protections of the laws because of the present system of election. It is contested that the Defendants have acted or refused to take any action on grounds generally applicable to any class of persons. It is contested that the Plaintiffs are now suffering or will continue to suffer irreparable injury or injury of any sort from the present system of election. It is contested that the present system of election was adopted for a discriminatory purpose. It is contested that there is a constitutional right to politically safe black electoral districts. It is contested that the factors or indicia of dilution, the presence of which are required in order to warrant disturbing the present electoral system, are present in Mobile County in connection with the manner of election of the members of the Board of School Commissioners of Mobile County. It is contested that the Plaintiffs lack access to the process of "slating" candidates, or that there is any formal process of "slating". It is contested that there is unresponsiveness to the particularized interest of the Plaintiffs. It is contested that there is a tenuous state policy underlying a preference for multi-member or at-large districting. It is contested that the existence of past discrimination precludes effective participation in the present system by the Plaintiffs.

DEFENDANTS' STATEMENT OF CONTESTED LEGAL ISSUES

It is the contention of the Defendants that multi-member district systems of election are not per se unconstitutional, and that the burden of proof of unconstitutionality is upon the Plaintiffs.

It is the contention of the Defendants that before the Court can consider granting relief it must first have found a constitutional violation.

It is the contention of the Defendants that the controlling legal principle is that arising in *Washington* v. *Davis,* —— U.S.L.W. 4789 (U.S. June 7, 1976) and that therefore before this Court can declare the present system of election to be unconstitutional by reason of its being "racially discriminatory" it must first be proven that the statute providing for the present system, when enacted, was enacted for a racially discriminatory purpose. Further, and in addition, the present system of election cannot be declared unconstitutional unless it is factually proven that the indicia of discriminatory effect or the "panoply of factors" referred to in *Zimmer* v. *McKeithen* are found to be present in Mobile County with regard to the present system of election of the Board of School Commissioners of Mobile County.

It is the further contention of the Defendants that the Plaintiffs are not entitled to relief unless it is proven that they are an identifiable segment of the population, dissimilar from other segments of the population; that the Plaintiffs have no constitutional right to a politically safe black electoral district; and that the mere showing of adverse impact upon the Plaintiff is not sufficient to carry the burden of proof of unconstitutionality.

UNCONTESTED FACTS

Plaintiffs are all black citizens of Mobile County, Alabama and are each over the age of twenty-one years, and reside where it is stated in the complaint they reside. John L. Moore is the Probate Judge of Mobile County, John E. Mandeville is the Circuit Clerk of Mobile County, Thomas J. Purvis is the Sheriff of Mobile County and these three officers serve as the appointing board for election officials and as the board of election supervisors to certify election results in Mobile County. Howard Yeager and Bay Haas are members of the Mobile County

Commission, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions are the present members of the Board of School Commissioners of Mobile County.

The Board of School Commissioners of Mobile County is composed of five members elected at-large for staggered six-year terms. These are partisan elections with majority vote-runoff requirements for the party primaries. The nominee of each party then runs in a general election. There are no residency requirements and the candidates run for numbered positions.

At least four black candidates have sought election to the school board, Dr. E. B. Goode in 1962, Dr. W. L. Russell, in 1966, Ms. Jackie Jacobs in 1970 and Mrs. Lonia Gill in 1974.

Mobile County has a total population of 317,308 of whom 32% or 102,383, are black.

PLAINTIFF'S STATEMENT OF CONTESTED FACTS

1. Whether, due primarily to segregated housing patterns, certain residential areas of Mobile County are racially identifiable.

2. Whether there has been any protracted history of racial discrimination in voting in Mobile County.

3. Whether there has been and whether there is now a high racial polarization of the vote when issues or candidates have an identifiable racial appeal.

4. Whether the present system of electing members of the Board of School Commissioners of Mobile County dilutes the voting strength of black citizens of Mobile County.

5. Whether local government officials, including the Mobile County School Board have been responsive to the needs and petitions of the black community.

6. Whether and to what extent there is a state interest in the maintenance of the present at-large election system for the Mobile County School Board.

7. Whether the creation of five or more single-member districts would enhance black access to the political process.

8. Whether the candidate selection process is open equally to black citizens.

PLAINTIFF'S STATEMENT OF CONTESTED LEGAL ISSUES

1. Whether the present at-large system for electing members to the Mobile County School Board unconstitutionally dilutes the voting strength of the black citizens of Mobile County, thereby abridging their rights to vote and participate in the political process relating to the selection of school board members guaranteed them by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, in violation of 42 U.S.C. §§ 1973 and 1983.

2. Whether the creation of an election system utilizing single-member districts is an appropriate remedy if the present at-large system is determined to be constitutionally defective.

3. Whether this Court has jurisdiction of this action under the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

LARRY MENEFEE
Attorney for Plaintiffs

ABRAM L. PHILIPS
Attorney for Defendants
School Board and Commissioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
213 U. S. COURT HOUSE & CUSTOM HOUSE
MOBILE, ALABAMA 36602

DATE: July 30, 1976

To: Gregory B. Stein and J. U. Blacksher
Edward Still, 601 Title Bldg., 2030 3rd Ave., N., Birmingham, Alabama
Jack Greenberg, James M. Nabrit, III & Charles E. Williams, III, 2030, 10 Columbus Circle, New York N. Y., 10019
James C. Wood
Ralph Kennamer
Abe Phillips

RE: CIVIL ACTION NO. 75-298 P

LEILA G. BROWN, ET AL
vs.
JOHN L. MOORE, ETC., ET AL

You are advised that on the 30 day of July 1976 the following action was taken in the above-entitled case by Judge PITTMAN:

Motion to strike from answer, filed by the plaintiffs July 29, 1976 GRANTED. Part concerning pages 2-3 of defendants' second motion for continuance and pages 3-4 of defendants' response to motion for default judgment is MOOT.

WILLIAM J. O'CONNOR, CLERK

BY:

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
AUG. 9, 1976
WILLIAM J. O'CONNOR, CLERK

LEILA G. BROWN, et al.,
Plaintiffs,
J. U. Blacksher
Larry Menefee

v. CIVIL ACTION NO. 75-298-P

JOHN L. MOORE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PROBATE JUDGE OF MOBILE COUNTY, ALA., et al.,
Defendants.
James C. Wood
Ralph Kennamer
A. L. Philips, Jr.

ORDER ON PRETRIAL HEARING

This cause coming on to be heard on a regular pretrial hearing on the 2nd day of August, 1976, and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed:

Complaint and answer as last amended.

2. It was agreed by all of the parties that the following are all of the issues in controversy in this cause:

PLAINTIFFS

See response to preliminary pretrial order filed July 30, 1976.

DEFENDANTS

See response supra.

3. The following facts are established by admissions in the pleadings or by stipulations of counsel at the pretrial conference:

See response supra.

4. The contested issues of fact are:

See response supra.

4b. The contested legal issues are:

See response supra.

5. It is ORDERED: This case is set for trial September 9, 1976.

On or before August 19, 1976:

If the paragraph is marked (X)

(X) (a) That each party in this case furnish counsel for the opposing party, for copying and inspection, all documents and exhibits that are to be used in the trial of this case, including those requested by subpoena duces tecum.

( ) (b) That the parties exchange the names of witnesses known or which reasonably should be known, this restriction not applying to rebuttal witnesses, the necessity of whose testimony reasonably cannot be anticipated before the time of trial.

(X) (c) All discovery is to have been accomplished. Experts may be deposed on or before 9/1/76 providing trial is not delayed.

(X) (d) That the parties file briefs with the Clerk of this Court, on or before 9/2/76.

(X) (e) The authenticity of any documents or exhibits is admitted unless it is specifically called to the attention of the Court and opposing counsel on or before August 25, 1976.

( ) (f) If the case is to be tried to a jury, it is directed that requests for instructions be submitted to the Court at the commencement of the case, subject to the right of counsel to supplement such requests during the course of the trial on matters that cannot reasonably be anticipated.

(X) (g) The qualification of any expert whose testimony is offered by deposition is admitted, unless it is specifically called to the Court's attention and opposing counsel on or before August 25, 1976.

( ) (h) Doctor, medical and hospital bills are admitted as reasonable unless specific objection is made to the Court and opposing counsel.

( ) (i) All parties seeking special damages are to furnish the other parties a list of their special damages.

( ) (j) All parties seeking damages are to furnish the other parties income tax returns for 19 , 19 and 19 .

(X) (k) If there are expert witnesses, the attorney must file, and submit to opposing counsel, a reasonably brief narrative form of their qualifications which are admitted unless called to the opposing counsel and court's attention on or before August 25, 1976.

(X) (l) The response to the preliminary pretrial order is incorporated and made a part of this order.

(X) (m) Counsel for the respective parties will file with the court, and opposing counsel, suggested Findings of Fact and Conclusions of Law, and a Judgment and Order, all appropriately designated, on or before Septem-

ber 2, 1976. The Findings of Fact and Conclusions of Law are to be in a form sufficient, in the opinion of counsel, to sustain his position on appeal.

6. The probable length of the trial of this case will be 5-6 days.

7. The prospects of settlement of this case are none.

It is further ORDERED by the Court that all of the above-named allowances and agreements be and the same are hereby binding upon all parties in the above-styled cause, unless this order be hereafter modified by order of the Court.

DONE this the 2nd day of August, 1976, at Mobile, Alabama.

Parties calling experts are to submit a statement of the subject matter on which the experts are expected to testify and the substance of the facts and opinions to which the experts are expected to testify and a summary of the grounds for each opinion, on or before August 19, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

Each counsel, upon placing a witness in the witness box for examination, shall read or state a summary of all background information concerning said witness, such as name, age, address, marital status, education qualifications, professional qualifications, and any other background information desired, and shall then inquire of the witness if such statements are correct. Thereafter, the second question to the witness shall be a question related to the merits of the case.

All parties are to submit to the court one week before trial a proposed reapportionment plan.

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
SEP. 2, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION TO SEVER AND TO DISMISS OR CONTINUE

Comes now the Defendant, Board of School Commissioners of Mobile County and respectfully moves the Court as follows:

1. To sever the cause of action stated against the Board of School Commissioners of Mobile County from the cause of action stated against the Mobile County Commission and the other Defendants herein.

2. To dismiss the cause of action against the Board of School Commissioners of Mobile County, or in the alternative, to continue the cause of action against the Board of School Commissioners of Mobile County until a later time.

In support of this motion these Defendants would respectfully show unto the Court as follows:

1. The choice of the form of governance of the Public School Systems of this country is a political issue committed under our federal Constitution to the states for resolution and, in the case of Mobile County, the issue has heretofore been resolved by the people of Alabama through their Constitution and by the Legislature of the State of Alabama through the enactment of statutes, providing for the form of governance of the Mobile County Public School System that now exists. All aspects of the governance and operation of the Mobile County Public School System are subject to determination by the Legislature of the State of Alabama. In the exercise of its discretion, the Legislature has heretofore provided that the School System shall be governed by a Board of five persons and has provided the method to be used in electing

them. Under our federal constitutional system, the determination of such matters is absolutely committed to state government for resolution.

2. To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present system provided by the Legislature of the State of Alabama through the laws of Alabama, for the election of the membership of the Mobile County School Board, is unconstitutional because it discriminates against certain citizens (i.e., black citizens and those persons who live in the rural areas of the County) in violation of the United States Constitution. This present system provides for a Board of five members, each elected from the County at-large by the vote of the qualified electors of the County at-large. This system exists in its present form by virtue of Acts previously passed by the State Legislature, and it can be changed by either an amendment to the Constitution of the State of Alabama or by other Acts that may hereafter be passed by the Legislature.

3. Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Sessions) reapportioning the School Board into five single member districts. This Act was introduced into the Legislature by Representative Cain Kennedy, a black Legislator who was a member of the law firm representing the Plaintiffs in this cause when this cause was filed. Passage of this Act by the legislature was procured by Mr. Kennedy with the cooperation of these Defendants, who, just as Mr. Kennedy, were satisfied that a Board composed of five members elected from single member districts would satisfy every constitutional requirement and would provide for equitable representation on the Board for the black citizens of Mobile County and the rural area citizens of Mobile County, in whose names and in whose behalf this action has been brought.

4. Following the passage of Act No. 1150 the Plaintiffs themselves then moved this Court to dismiss these

Defendants from this cause, and in essence to dismiss the School Board portion of the lawsuit, apparently because said Act 1150 provided a constitutional system of electing the School Board. These Defendants made no objection, and this Court granted the motion and dismissed these Defendants from the case.

5. Thereafter, said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex-parte and considered by this Court without these Defendants having an opportunity to be heard the Court reinstated these Defendants as Defendants in this cause.

6. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants expected the Plaintiffs, acting through Mr. Kennedy, to again procure passage of another Act by the Legislature providing for a constitutionally acceptable system of electing the School Board just as did said Act 1150. As time moved on and no such action was forthcoming these Defendants themselves procured the introduction into the Legislature of a Bill essentially identical to Act 1150 that would establish for the governance of the Mobile County Public School System a five member Board composed of five single member districts identical to those provided by Act 1150 previously introduced by Mr. Kennedy. This Bill was designated as House Bill 1060, Regular Session 1976. This Bill was introduced into the Alabama Legisture by Representative Nat Sonnier at the request of these Defendants, and these Defendants then exerted strong efforts to procure passage of the Bill into law.

7. Despite the efforts of these Defendants the Bill was not passed into law, but was blocked by the negative votes of three members of the Mobile County Legislative Delegation and the overt efforts of two of them to defeat the Bill. But for these negative efforts and votes the Bill would have been passed into law.

8. The three members of the Mobile County Legislative Delegation who prevented passage of the Bill are Representative Douglas Johnstone, Representative Gary Cooper, and Representative Cain Kennedy. Mr. Johnstone is white, Mr. Cooper and Mr. Kennedy are black.

9. These Defendants are informed and believe and upon such information and belief would aver that Mr. Johnstone expressed objection to the Bill based upon his evaluation that the Bill would not be constitutionally sound under the one man-one vote principle because of a deviation in the population in one of the five shcool commissioner districts that would be created by the Bill.

10. These Defendants are informed and believe and upon such information and belief would aver that Mr. Cooper and Mr. Kennedy blocked passage of the Bill upon request made to them by the leadership of and the spokesman for the class action Plaintiffs in this cause.

11. But for the opposition of Representives Johnstone, Cooper and Kennedy, the Bill would have passed the Alabama Legislature and would have reapportioned the Board of School Commissioners of Mobile County into five single member districts providing equitable representation for the black citizens of Mobile County and the rural interests of Mobile County.

12. Taking into account Representative Johnstone's concern for the deviation in size of the one of the districts these Defendants are prepared to introduce into the Legislature at the earliest opportunity and to procure passage of another Bill essentially identical to Act 1150 originally introduced by Mr. Kennedy and House Bill 1060 previously introduced by Mr. Sonnier at the request of these Defendants with a slight adjustment that will eliminate the deviation in size about which Mr. Johnstone expressed concern.

13. If the Court will dismiss these Defendants from this cause or continue this cause as it relates to these Defendants, thereby removing the coercive effect of federal intervention into the legislative process, it can be anticipated that Mr. Kennedy and Mr. Cooper will refrain from exerting their efforts to block passage of the Bill and the Board of School Commissioners of Mobile County can be reapportioned into five single member districts meeting all constitutional standards by the normal legislative process of the State of Alabama, which is, under our federal constitutional system, the appropriate way for such action to take place.

WHEREFORE, these Defendants respectfully request that the cause of action against them be severed from the cause of action against the other Defendants; and that the cause of action against them be either dismissed or continued at the discretion of the Court.

These Defendants further respectfully request that they be heard upon this motion at the convenience of the Court; and that the Court forthwith cause the issuance of subpenas to Representative Douglas Johnstone, Representative Cain Kennedy, Representative Gary Cooper, Representative Nat Sonnier, and to each and every other member of the Mobile County Legislative Delegation, whose names will be supplied to the Court, to appear before the Court for the purpose of giving testimony with regard to the matters and things concerned in this motion.

Respectfully submitted this day of September, 1976.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for the
Board of School Commissioners of
Mobile County
P. O. Box 8158
Mobile. Alabama 36608

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,
v.
JOHN L. MOORE, et al.,
Defendants.

CIVIL ACTION
NO. 75-298-P

ORDER ON DEFENDANT BOARD OF SCHOOL COMMISSIONERS' MOTION TO SEVER AND DISMISS OR CONTINUE

The defendant's motion to sever is hereby DENIED.

The defendant's motion to dismiss is hereby DENIED.

The defendant's motion to continue in order to give the Legislature of the State of Alabama on apportunity to act on a proposed redistricting is hereby DENIED.

The complaint was filed June 9, 1975. The defendant's attention is directed to a conderence with the attorneys for the Board of School Commissioners, the County Commissioners, and the City Commission of the City of Mobile, in open court on July 14, 1976. The long delay of the defendant in answering the complaint making the School Board, et al., defendants a second time, was called to the attention of the attorney for the defendant School Board.

It was at the request of the defendant School Board that a continuance was granted of the trial of their case at that time, although there were mitigating court scheduling problems.

It was common knowledge at that time that a proposed redistricting plan had been passed at a previous session of the Legislature but later declared unconstitutional. It was common knowledge there was pending in the State Legislature which

was then in session a redistricting plan. The court specifically advised counsel for all the parties that the court would not be disposed to further delay the trial or decision after the September, 1976, setting, and if any, or all of the defendants, anticipated seeking changes in the makeup or districting of their respective Commissions or Boards, they should take action while the Legislature was then in session. Due to the age of this case, and the Legislature having had two opportunities to act during its pendency, additional delays are not justified.

Done, this the 7th day of September, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
7TH DAY OF SEPTEMBER 1976
MINUTE ENTRY NO. 41619
BY_____
DEPUTY CLERK

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
FEB. 15, 1977
WILLIAM J. O'CONNOR, CLERK

NOTICE OF APPEAL

Come now ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, individually and in their official capacity as School Commissioners of Mobile County, Alabama, Defendants in the above styled cause, and file this, their notice of appeal of this Honorable Court's Order dated January 21, 1977.

SINTZ, PIKE, CAMPBELL
& DUKE
Attorneys for Defendants
800 Downtowner Boulevard
Mobile, Alabama 36609

ROBERT C. CAMPBELL, III

DANIEL A. PIKE

FRANK G. TAYLOR

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
FEB. 28, 1977
WILLIAM J. O'CONNOR, CLERK

NOTICE OF CROSS-APPEAL

Notice is hereby given that Leila G. Brown, Mary Louise Griffin Cooley, Joannie Allen Dumas, Elmer Jo Daily Edwards, Rose Lee Harris, Hazel C. Hill, Jeff Kimble, Frances J. Knight, John W. Leggett, Janice M. McAuthor, Appellants above named, hereby cross-appeal to the United States Court of Appeals for the Fifth Circuit from the Judgment entered in this action on January 18, 1977, but solely to the extent that said Judgment and Injunction fails to order new elections of all five (5) School Commissioners in 1978, rather than the staggered elections provided in 1978, 1980 and 1982 which allow incumbent School Commissioners, or some of them, to complete their current terms.

Date: February 28, 1977.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

BY: _____
J. U. BLACKSHER
LARRY T. MENEFEE

EDWARD STILL, ESQUIRE
601 TITLE BUILDING
BIRMINGHAM, ALABAMA
35203

JACK GREENBERG, ESQUIRE
ERIC SCHNAPPER, ESQUIRE
10 COLUMBUS CIRCLE
SUITE 2030
NEW YORK, N. Y. 10019

Attorneys for Plaintiffs-
Cross Appellants
Leila G. Brown, et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LILA G. BROWN, et al,	:	
Plaintiffs.	:	
vs.	:	CIVIL ACTION NO. 75-298-P
JOHN L. MOORE, et al,	:	
Defendants.	:	

THIS CAUSE COMING ON TO BE HEARD before The Honorable Virgil Pittman, United States District Judge for the Southern District of Alabama, on September 9, 1976, and succeeding days thereafter, commencing at approximately 9:00 o'clock A.M., each day.

APPEARANCES

For Plaintiff:

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and Brown
Attorneys at Law
1407 Davis Avenue
Mobile, Alabama

By: James U. Blacksher, Esq.
Larry T. Menefee, Esq.

Edward Still, Esq.
Attorney at Law
Birmingham, Alabama

For Defendant, County Commissioners:

Simon, Wood and Gardberg
Attorneys at Law
Van Antwerp Building
Mobile, Alabama

By: James C. Wood, Esq.

Ralph Kennamer, Esq.
Attorney at Law
First Southern Federal Savings Building
Mobile, Alabama

For Defendant, School Board:

Messrs. Pillans, Reams, Tappan, Wood,
Roberts & Vollmer
Attorneys at Law
3662 Dauphin Street
Mobile, Alabama

By: Abram L. Philips, Jr., Esq.

Reporter, Charles A. Howard

I N D E X

Witness - Douglas A. Parker	Page:
Direct - Still	33
Voir Dire - Philips	40
Continued Direct - Still	42
Voir Dire - Wood	44
Continued Direct - Still	47
Voir Dire - Wood	48
Continued Direct - Still	49
Voir Dire - Wood	52
Continued Direct - Still	53
Voir Dire - Philips	54
Cross - Wood	56
Cross - Philips	83
Witness - Dr. James Voyles	
Direct - Still	110
Cross - Wood	116
Witness - Dr. Cort Schlichting	
Direct - Still	121
Voir Dire - Wood	134
Continued Direct - Still	135
Voir Dire - Philips	141
Continued Direct - Still	155

I N D E X

Witness - Dr. Melton McLaurin	Page:
Direct - Blacksher	169
Cross - Kennamer	185
Cross - Philips	216
Continued Cross - Philips	240
Redirect - Blacksher	257
Recross - Kennamer	263
Redirect - Blacksher	266
Witness - Cain Kennedy	
Direct - Blacksher	268
Cross - Wood	289
Cross - Philips	310
Recross - Wood	336
Witness - Gary Cooper	
Direct - Blacksher	337
Continued Direct - Blacksher	357
Cross - Kennamer	367
Cross - Philips	394
Redirect - Blacksher	414
Recross - Kennamer	419
Witness - Dr. Cort Schlichting	
Direct - Still	423

INDEX

	Page:
Cross - Philips	433
Cross - Wood	443
Redirect - Still	460
Witness - Charles L. Cottrell	
Direct - Still	462
Plaintiffs' Ex. 60	464
Cross - Wood	475
Cross - Philips	500
Redirect - Still	521
Cross - Wood	529
Recross - Philips	532
Witness - Janice A. Dumas	
Direct - Menefee	534
Cross - Kennamer	537
Witness - Janice McArthur	
Direct - Menefee	542
Cross - Philips	552
Redirect - Kennamer	573
Recross - Philips	575

INDEX

	Page:
Witness - Robert Edington	
Direct - Blacksher	581
Defendant's Ex. 3	609
Cross - Philips	617
Redirect - Blacksher	630
Plaintiffs' Exhibits 56, 59, 90-91	635
Plaintiffs' Exhibit 61	637
Plaintiffs' Exhibit 69-71	638
Plaintiffs' Exhibits 86-87	639
Plaintiffs' Exhibit 92	639
Plaintiffs' Exhibit 95	641
Witness - Larry Menefee	
Direct - Blacksher	642
Plaintiffs' Exhibit 96	649
Plaintiffs' Exhibit 97	649
Cross - Wood	649
Cross - Philips	660
Witness - Lonia M. Gill	
Direct - Menefee	662
Cross - Kennamer	671
Cross - Philips	675

INDEX

Witness - Gerre Koffler	Page:
Direct - Menefee	681
Plaintiffs' Exhibit 63	684
Cross - Kennamer	695
Defendant's Exhibit 4	701
Cross - Philips	704
Redirect - Menefee	713
Recross - Philips	718
Recross - Kennamer	720
Witness - James E. Buskey	
Direct - Menefee	723
Cross - Wood	731
Witness - David D. Lee	
Direct - Menefee	739
Plaintiffs' Exhibits 76-85	747
Cross - Kennamer	754
Plaintiffs' Exhibits 1, 95, 93	763
Witness - Joseph N. Langan	
Direct - Blacksher	763
Cross - Kennamer	777

INDEX

	Page
Cross - Philips	788
Witness - John H. Friend	
Direct - Wood	806
Defendant's Exhibit 5	808
Voir Dire - Still	820
Continued Direct - Wood	827
Voir Dire - Still	842
Continued direct - Wood	844
Voir Dire - Still	845
Continued Direct - Wood	847
Witness - Dan Alexander	
Direct - Blacksher	856
Witness - John H. Friend	
Continued Direct - Wood	868
Voir Dire - Still	882
Continued Direct - Wood	883
Cross - Still	889
Plaintiffs' Exhibit 98	954
Defendant's Exhibit 6	997
Witness - Meyer Perloff	
Direct - Wood	998

I N D E X

Page:

Plaintiffs' Exhibit 10 1000

Cross - Blacksher 1005

Cross - Philips 1014

Recross - Blacksher 1017

Redirect - Wood 1023

Continued Recross - Blacksher 1024

Witness - Paul Kirkland

Direct - Kennamer 1028

Cross - Blacksher 1031

Witness - Douglas Modling

Direct - Wood 1035

Cross - Blacksher 1046

Redirect - Wood 1056

Cross - Kennamer 1058

Witness - Susie Kuffskie

Direct - Wood 1062

Cross - Blacksher 1068

Witness - Joseph Ruffer

Direct - Wood 1072

Plaintiffs' Exhibits 7,8,9 1075

Cross - Menefee 1096

I N D E X

Page:

Redirect - Wood 1110

Plaintiffs' Exhibits 73 and 74 1112

Witness - George Bay Haas

Direct - Wood 1112

Cross - Blacksher 1142

Witness - William J. Fulford, III

Direct - Philips 1158

Cross - Blacksher 1160

Witness - J. Thomas Sandusky

Direct - Philips 1163

Witness - Larry Newton

Direct - Philips 1172

Cross - Blacksher 1190

Redirect - Philips 1193

Witness - Bob Clardy

Direct - Philips 1195

Cross - Blacksher 1210

Witness - Henry H. Pope

Direct - Philips 1217

I N D E X

Page:

Cross - Blacksher 1241

Redirect - Philips 1249

Plaintiffs' Exhibit 99 1249

Witness - Jeff C. Mims, Jr.

Direct - Philips 1250

Cross - Blacksher 1252

Cross - Kennamer 1255

Witness - James J. Benson

Direct - Philips 1257

Cross - Blacksher 1264

Witness - James E. Voyles

Direct - Philips 1267

Cross - Still 1298

Plaintiffs' Exhibit 100 1343

Cross - Kennamer 1344

Recross- Still 1398

Witness - Lemuel Taylor

Direct - Philips 1349

Cross - Blacksher 1352

I N D E X

Page:

Witness - Dan Alexander

Continued Direct - Blacksher 1356

Plaintiffs' Exhibits 101-102 1363

Cross - Philips 1368

Defendants Exhibit 10 1378

Final Arguments 1381

MORNING SESSION

September 9, 1976 9:30 O'CLOCK A. M.

THE COURT: Gentlemen, this case of Lila G. Brown and John L. Moore, and others, what says the plaintiff?

MR. BLACKSHER: Plaintiff is ready.

THE COURT: What says the Defendant?

MR. PHILIPS: We have some motions we need to present to the Court.

THE COURT: All right.

MR. PHILIPS: Should we present them now, Your Honor?

THE COURT: Yes. You said you had more than one? Do you have another one?

MR. PHILIPS: Yes, Your Honor. This is a motion to reconsider the School Board's prior motion for severence and dismissal, or continuance. The prior motion, Your Honor, has already been ruled upon, denying the motion to sever, continue or dismiss.

My clients have instructed me to file a motion to reconsider and to ask Your Honor to reconsider

that action on that motion, and, particularly, to reconsider that aspect of the motion wherein we asked to be heard before the Court on all argument on the motion wherein we asked for the opportunity to present testimony to the Court bearing on the matters and things in the motion which, by Your Honor's ruling denying the motion, we have not had an opportunity to do. My client asks me to prepare and file a motion to reconsider.

THE COURT: Do you have anything further to set out than that which you set out in your motion?

MR. PHILIPS: Your Honor, we need to develop those materials by testimony.

THE COURT: How much time do you anticipate it will take?

MR. PHILIPS: Your Honor, I would aniticipate, probably, an hour.

THE COURT: It is difficult to see where it would take that long. I will give you an opportunity to argue it. What testimony do you expect to offer? I will give you an opportunity to make a showing.

MR. PHILIPS: Your Honor, I have the testimony of - - let's see, I believe I have subpoenaed five or six witnesses to appear here this morning for the purpose of testimony with regard to this motion.

THE COURT: Well, I am asking you to make

a showing as to what they would testify to.

MR. PHILIPS: I have three of the witnesses here now, and there are two others that have been subpoenaed that are not here yet. The showing of the testimony that we would intend to produce with reference to the motion is simply this, Your Honor, that the School Board, itself, has had no objection to reapportionment or redistricting of the School Board, that the School Board itself, when an act was introduced into the Legislature, supported the act before the Legislature, in an effort to procure passage of the act. The act was ultimately passed, and the act was introduced by Rep. Cain Kennedy of Mobile County. The act passed to redistrict the Board into a Board of five single member districts.

That act was then discovered to be unconstitutional, or invalid, simply because it was a local act, and it had not been properly advertised so it could properly be passed as a local act and was, therefore, void, under the Alabama Constitution.

The Board became concerned when that point was raised and submitted it to a Court for declaratory judgment, to determine whether or not, in fact, the act was valid or void, and the Court determined that the act was void by having not met the requirements of the Alabama

Constitution. Therefore, that act was voided by the Court by the order on the declaratory judgment.

Subsequently, the School Board then was readmitted as a defendant into this case on the plaintiff's motion. In the meantime, the School Board had anticipated the passage of another act in the Legislature to redistrict the School Board. The School Board, rightly or wrongly, had anticipated that Mr. Kennedy would reintroduce his act in a proper form that would meet the standards of the Constitution of Alabama, and gain passage. This did not occur. So, the School Board, itself, undertook to procure, or introduce into Legislature, another act that would distric the School Board into five single member districts.

In doing so, procured another representative of Mobile County. I believe this was Rep. Nat Sonier, to prepare and introduce the bill in the Legislature to accomplish the redistricting into five single member districts. These districts were set up on the basis of combinations of the House of Representatives Electoral Districts for Mobile County.

The original bill, which was enacted, Kennedy's original bill, combined the House of Representative districts into five School Board districts. The bill that was introduced by Mr. Sonier was constructed in the same

manner. It created five districts by the same combination of House of Representative districts so that there would be five single member districts.

The bill that was introduced by Mr. Sonier ran into opposition in the Legislature from three Mobile County legislators. As I understand it, the three who opposed passage of the bill was Rep. Cain Kennedy, Rep. Gary Cooper and Rep. Douglas Johnstone. My clients are informed, as a matter of fact, one of the members of the Board itself is an individual in personal discussions with Representatives in the Legislature when they were there lobbying in an effort to procure passage of the bill, and was informed that Mr. Kennedy and Mr. Cooper and Mr. - - Mr. Kennedy, by the way, was a member of the firm of the plaintiff in this case at the time this action was filed. My clients were informed that Mr. Kennedy and Mr. Cooper opposed passage of the bill on suggestion from the plaintiffs.

Our position is, bearing in mind that this is a class action lawsuit - - when I say on the suggestion of the plaintiff, I don't mean under the suggestions of plaintiff's counsel. It may have been, or may not have been. I make no contention in that respect.

Counsel will have to speak for themselves in that respect, but that Mr. Kennedy and Mr. Cooper voted

against the bill and effectively blocked passage of the bill upon request of the plaintiffs in the class action lawsuit that is now before the Court.

It is the contention of my clients that, based on that set of facts, these plaintiffs do not come to this Court with clean hands, that having blocked the passage themselves, of an act that would have redistricted the School Board in the very manner that the Court now has under consideration, that that blockage was solely on the basis of action taken by these individuals at the request of the plaintiffs themselves and that they effectively prevented the Legislature of the State of Alabama from undertaking action which is properly, I think we all agree, properly the function of the State Legislature; not to say that this Court does not have the power to act in the absence of action by the Legislature, but I think it cannot be contended that that function is first and foremost the function of the State Legislature. The State Legislature was in the process of acting, and we would intend to show to the Court that, but for the efforts to block passage of this bill by those people who acted on behalf of, or at the request of the plaintiffs, the Legislature would have acted, and would have enacted a redistricting plan of five single member districts that would have met all constitutional tests and requirements.

It is for that reason that we think our clients are entitled to have their motion to sever, and we don't intend to suggest to the Court that we want to hold up the entire lawsuit, since it involves other defendants who are not similarly situated with regard to the matters that I have spoken of this morning.

We did not ask the Court to continue the entire lawsuit, but that was the reason for asking for the severence. We think our clients, under these circumstances, should have an opportunity to pursue the efforts that they have been pursuing to procure the legislature to do that which is the function of the Legislature to determine and to set the manner of governments of the Mobile Public School System and the Legislature, having evidenced it's intent to do it by five single member districts.

We think the Legislature should have the opportunity to finish that task, and we think the School Board or the Legislature is entitled to have that opportunity. That is the reason we asked for the continuance.

We further make the showing, on behalf of the School Board, that it is the School Board's intent, if the case is continued in such a manner as to give the Legislature the opportunity to do so, that they would pursue and procure passage of a bill, as they have been

attempting to do to redistrict the Board into five single member districts similar, if not identical, to those districts that were a part of the original bill and introduced by Mr. Kennedy, which is the combination of the representative, or House of Representatives districts that are already in existence by virtue of reapportionment of the legislature, setting it up in a manner that would produce five single member districts that would meet every Constitutional test.

Part of the motion, or part of the pre-trial order, or proposed pre-trial order that has been filed by the plaintiffs, include the prayer for award of attorneys' fees. We think it is utterly incongruous, for example, the School Board would be forced to continue to trial and, if unsuccessful, forced to pay the plaintiffs' attorneys' fees, which, in fact, the School Board has attempted to do, and would have done, but for the efforts of attorneys - - excuse me, but for the efforts of the legislature to block the passage of the bill that would have accomplished the redistricting that the Court would ultimately require if, indeed, it finds that there should be a change.

For all of these reasons, we feel it is an equitable necessity that this matter be continued, insofar as it relates to the School Board, to give them an opportunity to complete the redistricting by the Legislature. This is basically the showing we would intend

11

to make, Your Honor.

THE COURT: Would the plaintiffs offer anything in opposition to that?

MR. STILL: Your Honor, we would. In opposition, we would show that there was no procurement of any action, or non-action, on the part of the plaintiffs.

We would further show that the only contact that Mr. Kennedy had with this lawsuit while he was a member of the law firm in which Mr. Blacksher and Mr. Menefee are members, was a casual one. He was never counsel of record, never prepared any pleadings, never really brought into the discussions of the case.

We further show, after Mr. Kennedyleft the law firm of Crawford, Blacksher, Figures and Brown, he did make a contact with the plaintiff's counsel during the trial of Bolden vs. Mobile, after the Sonier Bill was introduced, and inquired of us what our position on that bill was. We would show that counsel for plaintiffs, at that time, informed him that it was our opinion that the bill was unconstitutional under the Federal Constitution, because it did not provide for equal districts, because one of the districts would have approximately 53,000 people in it, while four of the districts would have 66,000 people, each, in them, and we felt that was beyond the pale of the standards.

12

We further pointed out to him that it was quite possible that this Bill would also, the Sonier Bill, would also be declared unconstitutional under the Alabama Constitution provisions, against the passage of local acts without advertisement, because the Bill had not been advertised, and was being disguised as a General Bill of local application, but, in fact, met what the Alabama Supreme Court calls a double classification test, and for that reason - - we made no effort to procure his action, or inaction, on the Bill, but simply informed him of what our position on the Bill was.

We would further point out to the Court that there has been no offer to show, by the defendants, that the Senate would have passed the Bill, and we would finally show, if necessary, that if the Bill had been passed, the plaintiffs' counsel were prepared to introduce a motion to attack that new act, the Sonier Bill, in this Court, as a part of this action. That would be all the evidence we would present on the motion, Your Honor.

THE COURT: Mr. Blacksher, is Mr. Kennedy still a member of your law firm?

MR. BLACKSHER: No, sir. He left, I think, in October of 1975.

THE COURT: If you should be successful in this lawsuit, would he participate in the fee in any way?

MR. BLACKSHER: In no way.

THE COURT: You have no agreement in that respect?

MR. BLACKSHER: That is correct. We have completely severed all financial ties at the time the partnership was dissolved. I would like to add to Mr. Still's proffer of what our proof would be, just a brief comment on the procedural posture that this motion brings to us.

I want, first of all, to point out, Your Honor, that the motion really contains, it appears, two parts. One, it appears that the School Commissioners are admitting liability. They say they do not object to re-districting the School Board. Of course, the threshold problem for the plaintiffs in this case is to prove that the existing system is unconstitutional, and that is what we intend to do, and develop most of our efforts toward doing, and have prepared to do today, and for some time. I am not sure whether they are saying that they admit whether the present system is unconstitutional and, therefore, we are fussing about what is the appropriate remedy. Either way, if we have to wait until next year to see what the Legislature does before we have a contest about liability, then our clients suffer severe prejudice. I think Your Honor would see that we have to go through the same thing

all over again.

If we are talking about a remedy, then we get into the questions and the issues that Mr. Still addressed; that is, whether or not the Bill that was introduced by Mr. Sonier was an adequate remedy, whether this Court could approve it under constitutional standards, or whether some other remedy should be provided. Regardless of that, it serves no purpose to continue this action to see what the Alabama Legislature is going to do in 1977, when the Alabama Legislature is obviously going to act independent of this Court, anyway, even if this Court found that the present system was unconstitutional and order a new system as a remedy pursuant to the plaintiffs' prayer, I am confident that the Alabama Legislature has it within its' power to propose another plan which we would then have to agree, or not agree, with, and bring to this court, and I am sure that is going to continue indefinitely into the future. I don't see how the defendants are served by a continuance of this trial, because they can still have whatever input they claim to have with the Mobile County Legislative Delegation for purposes of modifying whatever plan might come out of this court action.

THE COURT: Any reply?

MR. PHILIPS: Yes. I would like to respond briefly. I need to make it clear that in the position

the School Board is taking, they are not undertaking to confess to the Court, or to take the position that the present plan is unconstitutional.

They are taking the position, as they have taken, that whether it is unconstitutional or not, the basic drive, and the basic thrust of the lawsuit is to place a black, or one or more black persons, on the School Board, and to accomplish that through redistricting, if it can be proven that it is unconstitutional.

The Board's feeling that whether the present method is constitutional, or unconstitutional, they have no objection to redistricting. That is the position they are taking, and that is the reason they supported the original Kennedy Bill in the Legislature to redistrict into five single districts.

It is true, in fact, that the Kennedy Bill, as introduced, probably contained a population disparity in the districts, as Mr. Still described it. There was one district that was underpopulated by comparison to the others. We referred to that in the original motion, as Your Honor will recall.

We pointed out that there was that disparity. We pointed out the fact that when the School Board then procured introduction by Rep. Sonier of the second bill, that that disparity carried forward simply

because they proposed the same districts that Mr. Kennedy had originally proposed, but as I pointed out in the motion, the School Board has, in working with a statistical expert in preparation of the districts, found that that disparity in the population in the one district, can be very simply cured by the movement of two wards, I believe it is, into that district, maintaining the territorial integrity of the wards into a whole, not moving wards piecemeal, but moving two wards that would cure the disparity in population, and the Board is prepared to go forward and procure the passage, in the Legislature, of redistricting that would include the movements of these two wards to cure that disparity, and we referred, in the motion, to the fact that objections had been raised in the Legislature to that disparity, and I believe we attributed that to Rep. Douglas Johnstone. I am not sure if that is accurate, but, in any event, objection was made to that disparity.

The Board is prepared to proceed with a Bill that will cure that disparity. The question of whether any purpose would be served by a continuance. I think the purpose to be served should be entirely obvious. It goes back to the simple fact, again, that it is the function of the State Legislature to do this, and the State Legislature has not exhibited an unwillingness to do it, but, in fact, has exhibited a willingness to do it. In fact, has done it

by the passage of the Kennedy bill, and would have done it again by the passage of the Sonier bill, but for the efforts of Mr. Kennedy and Mr. Cooper to block the Bill.

The question of whether or not it would have passed, or been blocked in the Senate, counsel indicates that they were prepared to have it blocked in the Senate. Well, that speaks for itself. I don't think I need to add anything to that.

Counsel disclaims any effort to block it in the House, and we made no accusation that Counsel did want to block it in the House, but Counsel has indicated, himself, that they were prepared to block it in the Senate, because, as I understand it, because of the disparity.

MR. BLACKSHER: Your Honor, that is not what Mr. Still said.

THE COURT: Go ahead, gentlemen. Let's don't get into a personal thing. I heard you both, all three of you.

MR. PHILIPS: So, those are the points, Your Honor, I felt I needed to respond to. I think the Board is entitled to have the opportunity to have the Legislature do this. If this Court should proceed with these defendants and the other defendants, and an Order comes out of this Court, or a decree comes out of this Court requiring redistricting, or reapportionment, or some

variation thereof, which requires action upon the part of the Legislature, or which requires an election. It is not likely that the Court would require an election before 1978, under the practicalities of the situation. So, activity on the part of the State Legislature to redistrict in the 1977 Session, would be in ample time to dovetail into the legislative system and scheduling of elections.

We are not suggesting delay, or seeking delay, Your Honor, for the sake of delay. We are seeking a continuance and a dismissal, although I am not certain that the Court will seriously entertain the request for dismissal, although I think there is some factual basis for it. We are seeking a continuance, because the Board does not feel like it should be put to the task of a long and expensive trial, and then the ultimate possibility of payment of plaintiffs' attorneys' fees, when the Board is prepared to go forward, and has no objection to going forward, and accomplishing that which the lawsuit is designed to accomplish to begin with.

THE COURT: In our July conference, I think it was clear from the statements that I had made, that the Court, too, preferred for the Legislature to act, if it would. I called all the attorneys' attentions, at that time, that the Legislature was in session, and there was a pending bill, and that if action could be taken, it

should be taken, and the Court would not look with favor upon a continuance at the setting of this case.

This case was filed in June of 1975. This is August of 1976. The median time for trying and disposing of cases in this court runs from five to eight months, and this, somehow now, is fifteen months, or more. So, the Court, in this case, has certainly proceeded with deliberate speed, if not more deliberateness than speed.

The Legislature has had two opportunities, and the Court has no assurance that if they passed a Bill, that it would be constitutional, and then we would be stuck with a hearing. I would much prefer that these matters be served in the forums of the State. I think I would be derelict in my duty to all of the people, if I did not handle their litigation with some expedition, and I say this, as not preemptory expeditious - - considering the age of this case, and the seriousness of the problems involved, and the median case disposition of the other work of the court. I will take your proffer as to what your witnesses will testify to.

I might say, your proffer was covered substantially in your six page motion for continuance, and I don't really see anything in addition being added to it. I did want to give you an opportunity, orally, to make your motion before - - to make a proffer of what your evidence

would be. Considering the fact that your evidence would be such as you say it would be, and considering the fact that the plaintiffs' evidence would be as such, it is my judgment that this case should proceed to trial, and I will deny your motion.

MR. PHILIPS: Your Honor, I have some witnesses that were subpoenaed to testify, and I think they can be released?

THE COURT: Yes. They can be released; that is, the witnesses on the motion for continuance.

MR. PHILIPS: That's right. May I make it clear, so there will be no misunderstanding in this respect? We subpoenaed Mr. Kennedy, Mr. Cooper, Mr. Johnstone, Mr. Sonier and Mr. Callahan, and Mr. Sandusky, to testify on this motion. We would like them to remain under the Court's subpoena for testimony on the case in chief, but we are prepared to release them this morning with reference to the motion.

THE COURT: Well, any of your witnesses you may have on call, but I place the burden on you not to delay the Court.

MR. PHILIPS: Thank you, Your Honor.

THE COURT: All right.

MR. PHILIPS: Your Honor, I have another motion to present to the Court. Your Honor, this is a

I think the witness is being paid as an expert witness and has an obligation to be here and complete his testimony. We hesitate to give Counsel the opportunity to shorten up his testimony in this extended period of time.

THE COURT: We try to accommodate witnesses with their various other problems, particularly where a man has a school class to meet. In the light of expert testimony I think your fears and apprehensions are greater than they should be. I will let him go.

MR. STILL: Thank you, Your Honor.

DR. CORT SCHLICHTING

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows;

DIRECT EXAMINATION
BY MR. STILL:

Q May it please the court, this is Cort Burt Schlichting. He is 34 years of age and he lives at 301 Vanderbilt Drive in the City of Mobile. He is married.

His education includes a Ph.D. at Louisiana State University. He has lived in Mobile for the past five years.

He is now employed as a Professor of Economics at Springhill and at various other educational institutions around South-Western Alabama.

Would the Clerk hand the witness Plaintiff's Exhibit No. 8, please.

Dr. Schlichting, would you look at that exhibit, please, and tell us if that is an accurate resume' supplied by you?

A Yes, it is.

Q All right. Your Honor, among other things, that exhibit shows that Dr. Schlichting is an expert or has worked as an expert in several cases in the field of statistics before this court and other courts and has taught courses in statistics. We move his admission as an expert before this court.

THE COURT: All right. You may proceed.

MR. STILL: Dr. Schlichting, did you supervize Tony Parker in the preparation of the data for use in the regression analysis run in this case?

A Yes, I did.

Q Generally, what was the nature of your supervision of him?

A The supervision that I undertook was primarily methodological. He would come to me with difficultics of one sort or another in gathering the data and, between the two of us, we would attempt to solve those problems as they came up.

For instance, voter age population, and

things of this nature. So, this was the primary thing that I did with him.

Q All right. Now, the use of the voter age population, rather than the percent registered in a particular ward, why was that used?

A Well, I think it depends on which particular exhibit you are talking about, but - - I think when you are talking about voter age population, in some of the earlier exhibits that was - - I think that was used primarily because we only had the 1970 census data to deal with, and when we were referring to some of the later years, we felt it might be better to use Dr. Voyles' data, or the Southern Council's data, or whatever, to get voting age population.

Q All right. Now, specifically, in regard to the regression analysis, was there available data on a ward by ward basis indicating the percentage registered by race?

A I think not.

Q All right. Now, you heard Mr. Parker's explanation of how he constructed the - - what we call the synthetic wards in the rural areas?

A Yes, I did.

Q Did you take some part with him in deciding to use that particular method?

A Yes, I did.

Q First of all, why was it necessary to construct those aggregate or synthetic wards?

A It was necessary to construct those synthetic wards because the census data was not broken down in such a way - - it was in the block data. It was tract data. The census data was not available to us in any way that we could fit the census data to the precincts in the county. This being the difficulty, we did - and I instructed Mr. Parker to do this - and do the next best thing; that is find where the census data tracts and the precinct lines coincided, and we found these by the hardest to basically be a North Synthetic Ward Precinct, and a West, and a South Synthetic Ward.

Q Mr. Clerk, hand the witness Defendant's Exhibit No. 1.

Would you look at that map, please, and tell me if the lines that have been marked in on the county map - - I believe they are marked in in yellow.

A They are.

Q Are those the lines between the three synthetic wards created?

A Yes, they are.

Q Are those lines also lines that are established lines of precincts or wards in Mobile County?

A Yes, they are.

Q Would you tell us, Dr. Schlichting, what the function of regression analysis is?

A The function of regression correlation anaylsis is to attempt to determine whether there are any factors influencing other factors. If there are factors that influence a particular variable, whether it be voting or whatever it might be, progression analysis attempts to find a relationship between variables.

Q All right. Now, is regression analysis a standard statistical tool?

A Yes, it is.

Q Is it used for a variety of things besides analyzing voting patterns?

A Oh, indeed.

Q Now, in the particular case we have here, the regression analysis that you ran, what variables were being tested or were being fed into the computer?

A There were three variables; the income variable, the per capita income was one of them. The second variable was the percentage vote that a particular candidate got in a particular election, and the third variable was the voting age - - black voting age population over eighteen.

Q All right. Now, I believe, you referred in your earlier explanation, to the use of the terms independant

variables and dependant variables?

A Yes.

Q Which of those three were dependant variables?

A The one variable as dependant - - and what we attempt to do is find dependant variables to allow us to explain what goes on in the dependant variable. The dependant variable was a vote a person got in a particular ward or precinct.

Q The progression analysis function was to test whether or not that a particular candidate in a particular election was a function of income and or race of the voters.

A Exactly.

Q Now, have you read Dr. Voyles' thesis which is Plaintiff's Exhibit No. 9?

A I have read portions of it, yes.

Q Which portions did you read?

A I read the methodological portion where he sets out how he goes about analyzing the voting patterns in Mobile.

Some of the historical sections I have not read.

Q Does he use regression analysis?

A No, he uses an analysis that is very similar to regression analysis which gives the same results.

Q All right. What is the method he uses called?

A It is called Pierson's Product Movement Method.

Q Is there any significant difference between the Pierson's method and the Correlation Analysis Method that you used?

A No. It gives the same results.

Q All right. Now, Mr. Clerk, would you hand the witness Exhibit Nos. 10 through 52, please.

Your Honor, we have a bench copy of these computer print-outs, if you would like to see them.

THE COURT: All right.

MR. STILL: Now, you have had a chance to look at Exhibit Nos. 10 through 52, I believe, yesterday at our office here in Mobile, haven't you?

A Yes, I did.

Q Are those xerox copies of the computer print-outs that were made as a result of the regression analysis that you ran?

A Yes, they are.

Q All right. In each case there are three columns of figures, I believe, at the top of each computer print-out.

A That is correct.

was that race was quite a significant factor; whereas in a general election, that was not necessarily the case.

Q All right. Now, I believe that some of these dots, in addition to the slashes, some of these dots have numbers on them.

A Yes.

Q Are they keyed to something on Exhibit No. 53?

A Yes, they are keyed to the places 1, 2 and 3 - - I think are the numbers on Exhibit No. 53. One was Yeager, two was Smith, and three was Stevens in 1962 and the numbers on those little dots would indicate that that dot went along with those particular numbers.

MR. STILL: All right. Thank you very much.

Your Honor, that completes our examination and I note that is about two minutes until three.

THE COURT: All right. Let's take about a 20 minute break.

(Recess)

DR. MELTON A. McLAURIN,

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION
BY MR. BLACKSHEAR:

May it please the court, this is Dr. Melton A. McLaurin. He was born July 11, 1941 in Fayetteville, North Carolina and his present address is 808 Deerfield Court, Mobile.

He has a Bachelor of Science and Master of Arts degree from East Carolina University and a Ph.D. in American History from the University of South Carolina.

He is Associate Professor of History at the present time from the University of South Alabama.

Would the Clerk show the witness Exhibit No. 1.

Dr. McLaurin, is Exhibit No. 1 a reasonably up-dated copy of your curriculum vita?

A Yes, it is.

Q One of the things I noticed not listed there were the professional societies and associations you are a member of. Can you tell us about them briefly?

A I am a member of the Alabama Historical Association and a member of the Southern Historical Association, and a member of the National Education Association.

Q Dr. McLaurin, you were born in North Carolina. When did you come to Mobile?

A 1967.

Q What brought you here?

A Employment at the University of South Alabama as an assistant professor of history.

Q Have you been teaching at the college level very long?

A Since 1963.

Q What has been you field of speciality in your academic career?

A American History and, particularly, the history of the South and, since I have been in Alabama, development of the history of Alabama.

Q Since you have been in Mobile, have you devoted any time to a study of the history of the Mobile area in particular?

A Yes, I have, particularly the economy and social systems of Mobile.

Q Over approximately what period of time; the history I am speaking of now?

A Well, the economic history of the area and, to some extent, the social history of the area, especially since 1813. The development of the American period. I am not very expert at all on the Colonial period.

Q At the University of South Alabama, do you teach courses in Alabama history and Mobile history?

A Yes, I do a teach credit in Alabama history and a non-credit course in Mobile and the development of the city.

Q Have you ever testified in court before, Dr. McLaurin?

A Yes, I have.

Q When was that?

A I can't recall the date. It was in a similar case involving the City of Mobile and the Plaintiffs in this case.

Q And that was in the Bolden versus the City of Mobile?

A That is correct.

Q And you were called as a witness for the Plaintiffs in that case?

A That is correct.

Q Your Honor, we move that Dr. McLaurin be qualified as an expert witness on the subject of Southern History, generally, and on the history of Mobile.

THE COURT: All right.

MR. BLACKSHEAR: Dr. McLaurin, tell us what was the beginning of the political activity of black citizens in the Mobile area?

A Well, that entire movement can be condensed rather briefly. Mobile blacks began their development in politics with the adoption of the Reconstruction Acts of 1867.

They met in Mobile in convention to first

petition that they be allowed to participate in the political process, and, from that period until 1901 were active in the political process in the city and county and the state.

Q Were there many black voters during that period?

A Oh, yes. I couldn't give you exact figures, but there were several hundred black voters registered and active in the politics, local and state and congressional district politics, the entire spectrum of politics of Alabama in that period. There were certain wards in the city were, for example, predominantly black.

Q Did blacks vote actively during that period?

A Yes, blacks voted actively in both the county and city during this period.

Q What happened in 1901 to change the picture?

A Blacks were disenfranchised deliberately by a new constitution that was adopted by the state of Alabama in that year. After that time, the disenfranchisement section of the Constitution, coupled with the development of the white primary which was approved by the Supreme Court of the United States in later decisions, for all practical purposes, eliminated blacks from any participation in Mobile County and for the state of Alabama, for that matter.

Q Tell us about the 1901 Constitutional Convention from a historical viewpoint, the purpose of that

convention?

A There were several purposes of the convention, but from a historical viewpoint, I think the majority and over-riding reason for the convention was to disenfranchise blacks.

There were other questions involved, and one of the questions was restriction of suffrage in general. Other questions that came up involved the establishment of railroad commissions and other matters of a general reform nature.

Q Why did the delegates to the 1901 convention want blacks disenfranchised?

A Well, the reasons here would be relatively complex and, of course, some delegates did not - - there was a small token opposition to that - that is the disenfranchisement of blacks now - token opposition to the disenfranchisement of blacks on moral grounds and some on legal grounds, but there were two basic reasons for it.

The one reason was the fear that there could develop in the future a coalition between black and white voters, primarily of what we would today call Lower Socioeconomic Groups, or Laboring Groups, who would advocate programs that would be, from the viewpoint of certain members of the State Political Hierarchy, detrimental to the economy of the state.

Q What were the devices that the 1901 Constitution employed to disenfranchise black voters?

A Well, the most important device was a literacy requirement which was coupled with an escape clause to allow illiterate whites the right to register.

There were other procedures utilized including a cumulative poll tax. These was the two most important. I think it is important to see, too, in opposition to the disenfranchisement of blacks and too - - there was even more substantial opposition to disenfranchisement of whites. So much so, that the convention had to promise that the outcome of the convention would not, in any way, disenfranchise whites. This was a promise taken by all the members of the convention, because there was substantial opposition and substantial fear that there would be disenfranchisement of whites.

Q And that promise was carried out through grandfather clauses?

A Yes.

Q Was there any opposition among the black community here in Mobile to the 1901 convention?

A There was substantial opposition throughout the state and there was tremendous opposition in the black community on two levels. First, they opposed the calling of the convention and, secondly, as a matter of fact, their

opposition was thrown out when the votes were taken in Mobile. Votes against calling the constitution in Mobile were thrown out. So, it can be said that Mobile went in favor of holding the convention and, secondly, they voted against ratification of the constitution in Mobile, because the black vote was relatively free in Mobile, whereas in the black belt counties, it was almost entirely controlled.

Q And you mentioned the white primary as being another factor in black disenfranchisement. When did black voters again become a factor to any degree in Mobile?

A Well, black voters really were no factor in politics in Mobile until the white primary was stopped and it wasn't stopped in Alabama until after Smith versus Albright case in 1944, which was a federal case outlawing the utilization of the white primary race, and in the 1940's, it was challenged, and blacks were denied the right to vote in the election in 1944.

The Democratic Party of the state of Alabama was then ordered to allow blacks to register and vote in their primary race and they did technically open up the primary race and adopted a legislative program to keep blacks from voting, which was known as the Boswell Amendment.

Q Before you go into the Boswell Amendment, would the Clerk show the witness Exhibit No. 2, please.

Would you identify that xerox copy of an article that you wrote?

A Yes. That is an article that I published in the proceedings of the Gulf Coast History of Human Economics Conference in 1973. It was originally delivered as a paper.

Q Would you give us it's title?

A "Mobile Blacks in World War II, The Development Of A Political Consciousness."

Q Does it concern, in particular, this period during the 1940's and early 50's here in Mobile?

A It concerns primarily the period of 1944 to 1951, yes.

Q We move the admission of Exhibit No. 2 in evidence.

MR. KENNAMER: I haven't seen it, Your Honor.

Judge, we object on the grounds we haven't seen it before and hasn't been furnished to us.

MR. BLACKSHEAR: Yes, sir, we did furnish it to you. It was made available as were all the exhibits in Bolden versus Mobile.

THE COURT: I will have to resolve it.

MR. WOOD: Judge, I made a list of all the documents shown to me by Mr. Menefee and it is not on that

and marked in evidence.)

MR. BLACKSHEAR: This Smith versus Albright case, very briefly, Dr. McLaurin, originated out of Texas, the Supreme Court decision that struck down the Texas White Primary in what year?

A 1944.

Q What happened after this here in Mobile?

A Well, a group of Mobile blacks simply attempted to vote in the Primary election of the following year and were - - of the same year, as a matter of fact, 1944, and were denied access to the poll.

Q Was Mr. John LaFlore and Rev. - -

A Mr. LaFlore is the only individual I know specifically who was in that group. There were a number of - - I think it was 12.

MR. PHILIPS: Judge, I object to this line of testimony unless he was there and saw them vote, then I think this is heresay evidence.

THE COURT: It is heresay, but an expert can testify. Most expert testimony is based on heresay.

MR. PHILIPS: I realize that, but in the area of expert testimony, not in the area of factual testimony.

A It is recorded in Life Magazine. It was in May of 1944, I think.

MR. BLACKSHEAR: The events by which you are testifying about now have been matters of research by yourself personally; is that correct?

A That is correct.

Q And they have been reported in this article and in others?

A That is correct.

Q What happened when these black citizens were refused the right to vote in the Alabama Primary?

A They filed affidavites stating they had been refused the right to vote with the Justice Department and it was, at that time, that the Justice Department decided to allow the Democratic State Party, the State Executive Committee of the Democratic Party, time to rectify it's proceedings to bring them in line with the court decision of Smith versus Albright, which was done within about a year, I think. I will have to look at the article to get the exact date, but it was approximately a year.

Q All right, sir. What did the legislature of Alabama do?

A Then the legislature of Alabama passed the Boswell Amendment, which was the amendment that gave or passed the Boswell Act, which gave the voters - - the registrars rather sweeping powers in their determination as to who could or could not register to vote.

Q Was the intent of the Bosswell Act to allow this discretion on the part of white registrars to be used to keep blacks from registering?

A Of course, that was the entire reason for the passage of the legislation. There was no other reason.

Q Was that the announced intention?

A Yes, it was. Not only the announced intention but the Democratic Party State Executive Committee actually financed a campaign in favor of the amendment under the slogan that the Democratic Party in Alabama was a white man's party, quote, unquote.

Q How did the Boswell Act - -

A It was adopted by the voters of Alabama in 1946 and it was immediately challenged in the courts by a groups of blacks from Mobile, and many of these blacks were veterans of the second World War and they, in effect, took the County Board of Registrars to court claiming that the Boswell Amendment was unconstitutional because it granted these registrars too sweeping powers, and they won their case.

Q That was Davis versus Snell?

A That is correct. It was decided, I think, sometime in 1947, I believe, late 1946 or 1947 it would have been 1947.

Q By this court?

A Yes.

Q There after, after the - - after Davis versus Snell, were blacks then freely allowed to register in Mobile?

A Yes, blacks were allowed to register. There was some - - not prohibition - - some delaying tactics. For example, there were refusals to register blacks who were in line at the time polls closed and things of that nature, but, other than that, blacks were allowed to register.

There was a second effort in 1948 to pass a bill similar to the Boswell Amendment that was based on a description of voter rights, which is contained in the nationalization process, for people who are nationalized to become American citizens, and that piece of legislation was defeated because of a filibuster in the Upper House of the Alabama legislature in the fall of 1948 - - not the fall, but the spring of 1948, I guess.

Q And who participated in that fillibuster?

A There were four or five primarily urban senators who participated in it. For this area, the most important, of course, was Joe Langan, who was, at that time, senator from Mobile County.

Q Did your research reveal that Joe Langan's fillibuster, or participation in that fillibuster, cost him politically?

A I think that his participation in that fillibuster cost him politically. It was a volatile period. It was period in which various elements of the Democratic Party were struggling for the Party in Alabama and, I think, at that time, it did hurt Mr. Langan, yes.

Q Do you have any figures or, I think you have one in your article, about the number of blacks who were registered in Mobile County in 1946?

A I think - - 275 registered blacks in 1946. That is the beginning of the year, January of 1946.

Q Now, back to the - - how substantially did the number of black registered voters improve?

A It improved remarkably, because returning veterans from the war organized voter registration campaigns and this was the reason for the Boswell Amendment by the end of 1946. That is in one year, Mobile County blacks had reached approximately 1,300, a tremendous growth. That was the reason for the introduction of the Boswell Amendment.

Q Now, what was some of the slow-downs you were mentioning that were being employed to hold down the number of blacks who were seeking to register?

A The only slow-down tactic I know is the one of delaying registration of voters who were in the line; if they were in line pass the time to register and one member of the Board of Registrars stayed and worked with these people

after hours, so to speak, but generally the board was closed down.

THE COURT: Was that Mr. Boswell of Geneva County?

A Judge, I don't know what county he was from.

MR. KENNAMER: Yes, sir, Judge.

THE COURT: That is who I thought it was.

MR. BLACKSHEAR: Were there any written requirements whatsoever that remained for a person seeking to register to vote after the Boswell Act or amendment was stricken down?

A Yes, sir. There were still educational requirements, the ability to read and write, the Constitution of the United States. Essentially, a literacy test.

Q One more point, Dr. McLaurin, does your research reveal what seems to be common knowledge to most of us that blacks, since their re-entry into politics in the 1940's, have been predominantly in the Democratic Party?

A Yes. I think that is true and it has been true. It is just something that has occurred nationally, not just in Mobile and the state of Alabama.

Blacks, by and large, since 1932 have identified with the Democratic Party. That was certainly true in Mobile County, because the Democratic Party was essentially the only party in Alabama and in Mobile until

- - well, until the middle 50's when Mobile's political voting record on national - - in national elections began to change, and then, in the 60's, when it began to change on the county and district level, but still most blacks are identified with the Democratic Party and it also shows that there was a tremendous desire to actively participate in the political process on the part of the Mobile blacks.

Q Can you tell us what effect the 1965 Voting Rights Act had on black voter registration?

A I have not - -

MR. WOOD: I object to that. I think that is outside of his field of expertise. That is practically current events. I think this man is unqualified to answer that question.

THE COURT: I will let him answer. Go ahead.

A Judge, I would not be answering.

THE COURT: If you can't answer - -

A I could not answer that from the standpoint of a research historian.

MR. BLACKSHER: All right, sir. That is all we have.

CROSS EXAMINATION
BY MR. KENNAMER:

Q Dr. McLaurin, if we go back to the end of

A That is correct.

Q Most blacks were elected in the black belt at that time, were they?

A That is correct.

Q All right. Now, then, after that election of 1896, four years later, is when the movement began to have a constitutional convention in Alabama, wasn't it?

A That is correct.

Q Now, the constitutional convention and, I realize that the president of the convention, the presiding officer, and all of them, made speeches about how they need to write a constitution to keep the blacks from voting . . .

A Yes, sir.

Q . . .but that really wasn't the purpose of the constitution, was it, the constitutional convention, wasn't it, to write a constitution to keep the poor whites from voting?

A It was to write a constitutional conventi that would forever eliminate the possibility of pulling of the kind of coalition that certain Populists, including Joseph Manning, would like to have seen developed, which was essentially a coalition of black producers - as

the Populists used to refer to them - those people who produced, and, of course, you know the big villians of the Populists were the railroads and the trusts and the banks, and they had a whole list of villians that they didn't consider producers. What they wanted to do was form a coalition of both blacks and whites, what we call today - working class people, and the constitution of 1901 was an effort to see that such a coalition never took place in Alabama politics and, I admit, it was a wonderful piece of work in that it entirely prevented it for a good while.

THE COURT: What happened, it ended up preventing the blacks from voting but let the whites vote because of the grandfather clause?

A Yes, the blacks could be disenfranchised Those who had fought to develop this constitution and a restrictive franchise, as I have said before, there were probably people at that constitutional convention, if they could have disenfranchised anyone that made less than $30,000 a year, they would have been happy to do so.

They were able to disenfranchise the black vote, but did not have the strength to disenfranchise the white vote, and they had to take an oath, in essence, that they would not do that.

One of the ways the Populists were beaten

down in Alabama, as the other southern states, was to say, in effect, that the Populists were going to revert back to a radical reconstruction government and give blacks major offices, and so forth and so on. So, the racial tactics and racial scares that became so bitter in southern politics were really developed in this period. Some old Populists went on to refine them even more.

Q First of all, that constitution of 1901 eliminated females, didn't it? Doesn't it start off by seeking votes, all males?

A But, the constitution of the United States eliminated females. They were following standard operating procedure.

Q It starts off eliminating females, doesn't it?

A Yes.

Q Doesn't the poll tax that was written into the constitution of 1901, wasn't it for the purpose of helping it to eliminate poor whites?

A Yes, it was.

A And it was a cumulative provision, wasn't it?

A Yes, it was to 45 years of age, if I am not mistaken. I think that was the cut-off figure.

Q If you missed a year, you couldn't vote, unless you paid the prior year and that year?

A That is right.

Q Dr. McLaurin, in your study of Alabama history, you don't eliminate the Federal Judiciary as being a part of Alabama history, do you?

A No, sir. I must admit, however, that I give very little attention to the Federal Judiciary in Alabama until the 1940s when they began to get Civil Rights cases, primarily.

Q When you speak of the Federal Judiciary in Alabama, doing something that isn't some foreign power, it is Alabamians, isn't it, Alabama history, and a part of the history of Alabama?

A Well, yes.

Q Do you know who was one of the three judges, or do you know the three judges that struck down the Boswell amendment?

A No, I do not. I have it in notes, but I do not know the individuals involved in that case.

Q Did you ever hear of John McDuffie?

A No, sir. I don't know the judges.

Q Did you ever hear of John McDuffie as a Congressman from Alabama?

Q All right. Doctor, would it be concerning the background of blacks in the political process in Mobile County, would it be fair to generally summarize what you have said that blacks began involvement in politics in Mobile County with the Reconstruction Acts of 1867?

A That is correct.

Q And prior to that time, they were not a part of the political process in Mobile County?

A That is correct.

Q And that they were then active until 1901, and then that they again were eliminated or disappeared from participation in the political process of Mobile County in approximately 1901?

A That is correct.

Q By terms "actively a part of the political process in Mobile County", do you mean that they did not go and were not a political factor?

A That is correct.

Q All right, sir.

A They could not vote in the Democratic party.

Q So, prior to the Reconstruction Acts of 1867, they were simply a non-entity as far as politics were concerned?

A That is correct.

Q All right. In typical elections in Mobile County, during the period of time, from 1915 until 1925, approximately how many blacks would vote in the election in Mobile?

A From 1915 until 1925?

Q Yes, sir.

A I could not give you exact figures. I would say no more than 200 blacks.

Q By comparison to approximately how many whites?

A Again, I couldn't give you exact figures. I would think somewhere - - it was a tremendous increase in voter registration, probably ten or twelve thousand. I don't know, Mr. Philips. I couldn't give you an exact figure.

Q Let's shift then, just a minute from Mobile County to the State of Alabama as a whole, in the Alabama Legislature.

Were blacks a part of the political process in the Alabama Legislature prior to the Reconstruction Acts of 1867?

A No.

Q Then, during the period of time from 1867

to 1901, were they actively inv-lved in the Legislature?

A I couldn't give you the exact date the last black served in the Alabama Legislature. They were actively involved up until 1875 when you got a new Constitution. Even then, they still had political rights. There may have been some after that, but they were voting in Legislative politics.

Q So, after 1875, they had no influence in the Legislature at all, did they?

A No, I wouldn't say that they were voting after 1875.

THE COURT: But had no membership?

A Had no membership. I don't know for sure, Judge, but I would say the membership would be very minimal after 1875, and would pretty soon be non-existent, except, perhaps, during the Populist period, and I don't recall a person being elected then.

Q Say after 1901, were there any blacks in the Legislature?

A No blacks in the Legislature. As a matter of fact, I don't believe there were any blacks in the Legislature after Reconstruction of 1876. I think that is correct, but after 1901, there would definitely be no blacks.

Q All right. During the period of time from, say 1901, forward, - - from, say, 1901 to - -, well, after 1901 when did blacks begin to become a part of the political process in Mobile again?

A After 1944.

Q After 1944?

A Yes.

Q All right. During this period of time from 1901 to 1944, given the situation that you have described, were blacks had been completely removed from the political process in Mobile County, if the people of Mobile County had been desirous of preventing blacks from serving as elected members of the school board, would it have been necessary for them to take any particular exclusionary steps - - to take any particular step to avoid them being elected to the Board?

A I don't follow you. I am sorry. I don't understand your question.

Q All right. Let me back up a little bit. You have described that during the period of time from 1901 until 1944, that blacks were simply not a part of the political process in Mobile County?

A Yes.

Q Not a factor, politically, in Mobile

County?

A Right.

Q I am asking you, then, given that situation, during this period of time, if the people of Mobile County had wanted to prevent blacks from being elected to the School Board in Mobile County, would it have been necessary for them to do anything more, or were blacks already in a position where they could not be elected?

A In my opinion, it would have been unnecessary for them to do anything else.

Q Would it be unnecessary for them to establish a school board elected in any particular manner to prevent blacks from being elected to the board; is that correct?

A That is correct. It would have been unnecessary.

Q All right, sir. Now, during the period of time, from the time, say, 1825, 1826, up until the Reconstruction Acts, I believe you said, for the same situation, blacks were simply not a factor?

A That is correct.

Q If the people of Mobile County had wanted to establish a method of election of the school system, or the school board, that would avoid blacks becoming a

member of the board, would it have been necessary for them to do anything, or were blacks already in that situation?

A The question is a moot question. I don't think it would have occurred to them that blacks would have become members of the board, but it would not have been necessary, not before 1865, certainly.

Q It would have been impossible?

A Yes.

Q It would not have been necessary for them to set up the board and provide for the manner of election to the board in any particular way to avoid blacks coming on the board?

A That is correct.

Q Have you had any occasion to make a study of the mechanics of the Mobile County Public School System over the years?

A No.

Q Have you made any study of the election of the members of the school board over the years?

A No, I have not, and I am not familiar with elective members of the school board, outside of the period of my own political experience.

Q Do you know the names of the present members of the board?

September 10, 1976

THE COURT: All right.

MR. BLACKSHER: Your Honor, Dr. Goode was unable to be here. At this time, we have Dr. McLaurin to continue, if it please the court.

THE COURT: All right. That is the way I wanted to do it. I wanted to finish with him anyway.

DR. MCLAURIN

the witness, resuming the stand, testified further, as follows:

THE COURT: Mr. Philips, I will remind you it is with the discretion of the court, matters beyond the direct examination gone into and, with the minuteness of the examination and the matters I mentioned to you yesterday, I am going to limit your examination to about thirty minutes this morning on these matters that were not gone into on direct.

MR. PHILIPS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PHILIPS:

Q Dr. McLaurin, yesterday in your testimony I believe you told us that up until the Reconstruction Acts in 1867, black persons in Alabama could not vote; is that

correct?

A Yes sir.

Q And they were not involved in the political process, were not a political factor, and I believe you said they were, in essence, a non-entity from a political stand-point.

A Yes sir.

Q Given that situation that you have described; in your opinion, would an act passed by the legislature of Alabama in 1826 providing for the Mobile County Public School System to be governed by a board of citizens elected by a majority vote in county wide, at large, elections, would that have been passed with the purpose in mind of preventing the election of black persons to that board?

A No.

Q All right. In your opinion, could those responsible for the passage of such an act reasonably have foreseen that that system of government of the school system or that system of election would, in the future, have the effect of preventing black persons to election of the School Board?

A That would not have been one of the considerations.

Q It would not?

A It would not.

Q In your testimony you said after the end of the

era of the Reconstruction Acts and beginning with the passage of the new Constitution of 1901 or it may have been shortly than before, but roughly then, and continuing through approximately 1944 that black persons were again in that position of being a non-entity, politically speaking, in Mobile County; is that correct?

A That is correct.

Q Given that situation as you described it, if the legislature of Alabama passed an act providing for a school board of citizens elected by majority vote in county-wide, at large, elections; in your opinion, would that act have been passed with the purpose in mind of preventing the election of black persons to the School Board?

A Are you talking about during the period of 1901 to 1944?

Q Yes sir.

A In my opinion, any legislation passed, at that time, would not have been unmindful of the possibility of future negro votes, but it would not have been a major motivating factor.

Q It would not have been unlikely, would it?

A I repeat, I don't think it would have been a major motivating factor. I do think it might have been a consideration, reasonably not in absolute detail about how people were elected, but just as a general concept.

Plaintiffs were to prevail in this law suit, wouldn't you like to be in position to look back and say - -

THE COURT: That is argumentative. Let's go on to another question, Mr. Philips.

MR. PHILIPS: That is the last question I have, Your Honor.

THE COURT: Do you have any questions?

RE-DIRECT EXAMINATION

BY MR. BLACKSHER:

Q Dr. McLaurin, Mr. Philips asked you about some of the campaigns you worked in and, in the course of your answering, I think you said that with regard to the white candidates for whose campaigns you had done some work, tha they had had some practical constraints with regard to how they would appeal for the black vote. Would you be more specific about what you meant?

A Well, I think it is generally common knowledge in political circles that, in attempting to appeal to the black voters, one has to balance off - -

MR. PHILIPS: Your Honor, I object to that testimony on the basis of common knowledge. My examination was limited to his personal experience in these areas and I think this examination should be

A All right. I will rephrase my answer. In my

personal experience, I have seen that in order to appeal to the black vote, if there - - when there was such a thing that white candidates could not, as openly, appeal to blacks as they can appeal to whites, and my personal reaction to the situation was that it was somewhat demeaning to both blacks and whites involved in the process.

MR. BLACKSHER: In what ways would some of the white candidates, whose campaigns you worked in, appeal for the black vote? Would they go out to meetings in the community?

A Prior to the recent - - very recent years, last two or three years, it was not done.

Q But, in recent.

A Except by one candidate, I would say that Joe Langan did that.

Q And when Joe Langan went out to a meeting in the community, was it politically possible or practical for him to advertise that he had gone and sought the support of these people and list these black leaders among those persons supporting him.

MR. PHILIPS: Your Honor, I object to that. That calls for an opinion that this witness has no basis to testify to. I think Mr. Langan could testify to that.

MR. BLACKSHER: Your Honor has allowed this witness to give his personal opinion on a wide range of

subjects.

THE COURT: I surely have. I will let him answer it.

A My personal opinion is that, as the racial issue became more heated, it did not do Mr. Langan any good to have his associations known, his openness, his frankness on this issue.

Q You were more active in the campaigns of the legislative campaigns of Charles Bell and Clarence Montgomery than you were in most of the other campaigns, weren't you?

A Yes. I was extremely active in both of those campaigns.

Q Concerning those two campaigns, which was for a specific election to fill two vacancies in the House of the Representatives; is that correct?

A Yes.

Q I would like to read you a brief passage from Exhibit No. 9, which is Dr. Voyle's dissertation in which he is commenting about those two races.

He says, and I quote, "also in 1969, the Republican Party felt strong enough to demand representation in the county's legislative delegation, a local attorney filed for one of two vacancies in a special 1969 legislative contest. The Democratic Party in the campaign

had a candidate supported by George C. Wallace, who they wanted elected at any cost, since two black candidates were willing and one for each state, and that would have been Mr. Bell and Mr. Montgomery. It was feared that a head-on confrontation between Nettles and Lyons would result in a plurality for a black in one of the elections and thus an agreement was reached. Lyons would run for one place and Nettles for the other. In return, the Democratic County Committee agreed that Nettles would place no strong opposition in his contest since this was a special election.

The Democratic County certified the Democratic candidates without primary elections and kept their promise not to run a candidate against their candidate Burt Nettles.

Were you active enough in their campaigns for Mr. Montgomery and Mr. Bell to verify the fact in which these events occurred?

MR. WOOD: Your Honor, I object to that question. That exhibit is not in evidence and we haven't had an opportunity to test it's authenticity or it's accuracy. In addition to that, it is totally irrelevant.

Legislative races have no relevancy in county elections or school board elections, and that is the basis of my objection to that question.

THE COURT: I will let him answer.

A I would not disagree with Mr. Voyle's dissertation on that subject.

THE COURT: No, that is not what he asked you. He asked you were you familiar enough with the races to be able to verify that that occurred or not.

A I could not testify directly that such an agreement between the Democrats and the Republicans occurred, no.

MR. BLACKSHER: Was there in the Bell or Montgomery campaigns a conscious political strategy that they adopted to take into account that they were black candidates running in a county-wide race in Mobile County?

A Oh, yes. They believed that with both a Republican and Democratic candidate in the race, if they could get reasonably attractive black candidates to enter the race, there wouldn't be the primary problem that there - - there were actually four candidates in one of the races - - that there would be more of split in the vote, and they were hoping that they could appeal to the black vote and try to draw some support from enough whites, just a few whites, which they thought was the only possible thing in such a race, that they could perhaps elect a black member to the state legislature with only a plurality. They felt this was the best chance that the black community had had since Reconstruction to send a black representative to the

state legislature.

Q Who did Mr. Bell end up running against?

A Mr. Bell, in that race, ran against Mr. Nettles, who was the Republican candidate, and Mr. Harry Clark, who was the Democratic candidate, and Mr. Bill Westbrook, who was another independent candidate in the race.

Q How did that election come out?

A Mr. Nettles won in the election with an absolute majority, 51%.

Q Did Mr. Bell get substantial support from the black community?

A Yes, he did.

Q What happened to Mr. Montgomery? Who did he end up running against?

A Mr. Montgomery was paired against Mr. Lyons, and I don't have the vote totals on that, but Mr. Montgomery was rather handily defeated by Mr. Lyons in that race.

Q Was there a Democratic candidate certified in the race in which Mr. Bell was a candidate?

A Yes.

Q Who was that?

A Mr. Clark.

Q Who was Mr. Clark? What was his background?

A I am not that familiar with Mr. Clark's background.

CAIN KENNEDY

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

May it please the court, this is Mr. Cain J. Kennedy. His address is 317 Montgomery Street, Pritchard, Alabama.

Mr. Kennedy has earned a Bachelor of Arts degree from California State University in 1966; his Law degree from George Washington University in Washington D. C. in 1971. He is a practicing attorney here in Mobile County and is the elected member of the House of Representatives from House District 98.

Mr. Kennedy, would you tell the court - - were you born in Mobile?

A No. I was born in Marengo County, Thomaston, Alabama.

Q How long have you been a resident of Mobile County?

A I came here in 1955 and lived here for two years and I went away for the next fifteen or so years and came back in 1971.

Q Did you go to the Public Schools here in Mobile

County?

A Yes.

Q Which school?

A Mobile County Training School.

Q When it was an all black segregated school?

A That is correct.

Q Did you enter the Navy when you got out of high school?

A Yes. I went into the Navy right out of high school and I remained there for six years.

Q All right. And you came back to Alabama after you finished your law school?

A That is correct.

Q Would you tell the court the extent of your activity in Mobile County politics?

A Well, I was elected in 1974 to the Alabama State House of Representatives from District 98 and, of course, I was elected as a delegate to the Democratic National Convention, this year, 1976. That is the extent of my politics.

Q In those elections, were you required to run county at large?

A No. I was required to run from districts.

Q Would you describe to the court the demographic characteristics of House District 98?

tics in Mobile over a long period of time.

THE COURT: Did you come back to live - -

A I came back to Alabama in 1971 and came to Mobile in 1973.

THE COURT: I will let him tell about based on his political experience since '73 and not before that.

MR. BLACKSHER: All right, sir. Could you answer the question?

A Would you ask me the question again?

THE COURT: He wanted to know if race was a factor in Mobile County politics.

A It has been my experience that race is a factor in Mobile politics during the time I have been here.

MR. BLACKSHER: How have you seen that factor evidenced?

A Well, I saw it evidenced in the - - much recently in the Wiley - Bridges race. That is the most recent case I can recall.

Q What happened?

A Well, of course, there was some literature that was put out in the community implying that - -

MR. WOOD: Your Honor, I object to this testimony unless the literature is brought in before this court as direct evidence.

THE COURT: I am going to let him express an

opinion.

A There was some literature put out in the community accusing Ray Bridges of turning loose some Deputy Sheriffs on some high school students during the time they had some incidents at Murphy High School. It was accusing him of catering to the blacks of the community.

Q Aside from the literature that you have seen, or the advertising that you have heard in these campaigns, what other evidence have you seen of race as a factor in the voting patterns here in Mobile County?

A Well, another example in the voting patterns - - it was, I would think, that the Perloff - Buskey race would be an example.

MR. WOOD: Your Honor, I object to any testimony on the Perloff - Buskey race. It is completely irrelevant. That is a single member district. This matter refers to multi-member litigation.

THE COURT: I will overrule and let him answer.

A I would think that that would be an example, since, in that district, Buskey received, I believe, just about 80%, 80 to 85% of the black votes and Perloff received about 90 to 95% of the white votes. It might have been a little more.

MR. BLACKSHER: In your campaign for office to House District 98, did you devote a substantial part of

House District 98?

A Well, I used to, before I had my phone changed. I received a number of calls. So, I finally had it disconnected and had a private number placed, but I just received too many calls and it got to the point that I became frustrated because I couldn't do anything about the problems people were concerned with.

Q You are a legislator, not an administrator?

A That is correct. I might add, that I had gotten calls as far away as Birmingham complaining to me about problems.

THE COURT: Well, let's don't go into Birmingham's problems. We have enough down here.

MR. BLACKSHER: Mr. Kennedy, you offered yourself, as it turned out, successfully for representative of House District 98. Would you have considered running for county-wide offices, such as the School Board or County Commission?

A No.

Q Can you tell us why?

A I believe that my chances of success would be rather nil.

Q What do you base that opinion on?

A I base that opinion on that fact that the blacks constitute a decided minority in terms of total voters in Mobile County and, of course, based on the fact that there

have been a number of other persons who have run county-wide and none have been successful.

Q What about the white politicians who do run in these county-wide elections. Do they solicit the vote of the black citizens?

A I think they solicit the vote of the black citizens. Some campaign in the community. Some don't.

Q How do they go about it?

A It has been my experience that, of course, some of the white politicians come into the community and get to know the people in the community and talk about the problems in the community. I don't know whether they talk the same talk in the black community as they talk in the white community.

Again, some of the others contact key black people in the community, those people who have some kind of influence, and try to get votes that way.

Q Have you observed these candidates to have expressed the concerns that you have told us about that exists in the black community about certain problems openly in their campaigns?

A I have seen them express some of these concerns in the black community. I don't know whether or not they express these concerns in their overall campaigns.

Q What I meant, was openly in the media that goes

throughout the county?

A No, I have not.

Q Is the cost of campaigning any factor, in your opinion, why black candidates do not offer themselves for county-wide offices?

MR. WOOD: Your Honor, I object to that.

MR. BLACKSHER: Can you tell, in your opinion, as a politician, what it would cost to run for, say, the County Commission?

A . To run a viable campaign, upwards of $25,000; perhaps more.

Q And what about for the School Board?

A I would think that the School Board would cost less.

MR. PHILIPS: Your Honor, I object unless the witness can show some familiarity for campaigns with the School Board or some contact with campaigns for the School Board. Any opinion he might have on that would be no better than anyone else in this courtroom.

THE COURT: I think someone running for office has some judgment. If you run for office in a small area or large area, I will let him express an opinion. I was involved in politics, before I came on the Federal bench, all of my adult life. It defies common sense that people involved in politics don't have knowledge for it.

MR. PHILIPS: Your Honor, he has run on one occasion in one district-wide race attempting to testify - -

THE COURT: I suggest you run for a race one time and you will get some judgment.

MR. PHILIPS: Your Honor, I suggest I have, and I was elected about that particular race.

MR. BLACKSHER: What kind of cost are we talking about?

A Well, it all depends on whether or not you use the media. I didn't use it except in a very small way. The cost of my campaign wasn't that great.

Q Could you afford not to use it in a county-wide race?

A Well, I don't believe you could afford not to use it and be successful.

Q Mr. Kennedy, does your experience as a member of the Alabama Legislature - - has it shown you that the legislators of Alabama today are aware of the effect that the at large voting system in Mobile County has on the black vote than it's delusion?

MR. WOOD: Your Honor, I object to that question.

THE COURT: Read that question back to me, Mr. Reporter.

(Whereupon, the last question was read by the

Court Reporter.)

THE COURT: I will let him answer.

A Yes.

MR. BLACKSHER: Tell us what your observations have been in that regard.

A Well, take for instance, when I introduced the Bill to re-district the county School Board, I think the first thing that my colleagues asked, the first question, very first question, would be how many blacks would your Bill put on the School Board, or how many blacks would your Bill put on the County Commission. I think they are acutely aware that a black has no chance of being elected in Mobile County as long as the races are at large.

Q And they are aware of what single member districts would do to the chances of blacks to be elected.

A Certainly they are.

Q You introduced in the 1975 legislature two bills to re-district, or to cause the County Commission and the School Commissioners to run in the districts; is that correct?

A That is correct.

Q And eventually your Bill for the School Board was able to pass.

A The School Board passed and the County Bill, of course, failed.

Q First of all, was the School Board Bill passed as you originally offered it?

A No, it was not passed as I originally offered it.

Q What changes were made? What amendments?

A The most significant changes that were made were changes made to accommodate the commissioners who were in office, at the time, the people who came up for election this year.

The change was made to accommodate, I believe, Dr. Berger, because, in my original bill, I had District 1 which would be the northern part of the county scheduled for election, but we shifted that around to make it possible for Dr. Berger to run again and, I think, an accommodation was also made for Mr. Williams, because his District, the area in which he lived, was not scheduled for election in this year. That was the two main accommodations that we made.

Q When was the district which had a majority black population scheduled for election in the final bill?

A I am sorry. That was also another accommodation. In my original bill, it was scheduled for this year and, of course, in the amended bill, the one that finally came out and the one finally signed by the Governor, that was postponed until 1978.

Q How were you able to get this bill enacted even

in it's amended form?

A That was kind of a part of an overall compromise situation.

We agreed in the Senate that my bill would be let out of the Senate if I, of course, voted for the Chickasaw Annexation Bill.

Q That was Senator Perloff's Annexation Bill?

A Right. As you know, the legislature, the local legislation, was at a stalemate at the time. I think Senator Perloff was not going to let anything through unless we took some favorable action on his Annexation Bill.

The effect of the whole compromise was that my vote on the Chickasaw Annexation Bill would serve to move that bill out of committee and then, of course, to move out of the local legislation.

Q Mr. Kennedy, would you say, for the record, whether there was any connection between this law suit and the bill that you filed in the 1975 legislature for making the County Commission and the School Commissioners run out of districts and which occurred first?

A I believe I filed my bills before you filed the law suit.

Q And did you participate in any way in the preparation of the papers of this law suit, or the planning of the law suit, or the strategy of the law suit?

A No, I did not.

Q Did the lawyers in this law suit for the Plaintiffs participate in any way in suggesting how your bill should be drawn or that your bill be drawn?

A No.

Q Did we suggest that you - - did we in any way suggest that the bill be filed?

A No.

Q During the course of the legislature in '75, did the dependency of this law suit, which did come after the bills were entered, play any part in the discussion that you had with other legislators about those bills?

A I would think - - I think the law suit was certainly mentioned, and I tried to impress upon my colleagues that the law suit was in litigation. If we didn't do something, the court probably would.

Q Tell us why the County Commission Bill didn't pass?

A Well, I had been led to believe that there was no opposition against the County Bill when I voted for the Chickasaw Bill.

Q You mean the bill that broke the log jam . . .

A Right.

Q . . . in the final days of the session?

A That is correct, but after the log jam was broken,

then, there was a complete change of attitude. Senator Bill Roberts, at that time, informed me that he could not let the County Commission Bill through.

Q Did he tell you why?

A Well, I think - -

MR. WOOD: Your Honor, I object. That calls for heresay.

THE COURT: Overruled.

MR. BLACKSHER: Mr. Kennedy, did you oppose Mr. Sonnier's bill to district the School Board in the 1976 legislature?

A I voted against it, yes.

Q Could you tell the court why?

A There were a number of reasons that I voted against it. Three that I can think of.

After the 1975 bill was passed, I think the School Board took it to court, and it was declared invalid for the reason that it had not been advertised correctly. The reasons that I opposed Mr. Sonnier's bill were three. I had been led to believe, subsequent to the passage of the 1975 bill, that the Mobile School Board was created by a constitutional amendment and, therefore, could not be changed by a local bill or general bill, not by the legislature. Again, the Sonnier bill had double classification. There was an inconsistency in addition to the double classification. There was an inconsistency in the title of the bill and the body of the bill, and I thought it would be unconstitutional for that reason.

Q Under the Alabama Constitution?

A That is correct, and, of course, the third reason was that I felt that there was too much of a disparity between School District 1 and the other four districts in the bill, and my bill, and in Nat Sonnier's bill, School District 1 would have included House District 96 - 95. Those parts of Mobile County, plus 97. That district would have been about 10,000 voters less than the other four districts

Q Mr. Kennedy, did you oppose the Sonnier bill at the request of Counsel for the Plaintiffs in this case?

A No, sir. I didn't oppose it at the request of Counsel.

Q You did have a conversation with at least one of the lawyers of the Plaintiffs in this case at some point.

A I had a conversation with a number of people, including probably one of the lawyers - - one of the Plaintiff's lawyers.

Q Tell us about the state action that was filed and resulted in the 1975 School Board Bill which you had introduced being declared unconstitutional under the Alabama Constitution. What was the - - well, as it is a matter of record that there was a discrepancy in the advertising

of the bill that the court found, could you tell us a little bit about what that discrepancy was coined to be?

A I don't know anything about it except what I read.

Q Can you tell the court whether the bill was defended in the state action?

A No, it was not. I don't believe it was defended. I think the attorney generally is charged with defending.

Q I mean, you did not appear either as Counsel or as a client in some way to try to defend that bill?

A No, I did not. I did not appear.

Q That would not have been your province or your capacity?

A That was not my responsibility to defend any legislation passed by the state legislature.

Q Did you see problems in the Sonnier bill that might also have been subject to attack in a similar state court proceeding?

MR. PHILIPS: Your Honor, I think he has already testified to that.

THE COURT: If you say any problems in addition to what you have already told us?

A No, sir. No problems in addition to what I have already said.

MR. BLACKSHER: I welcome ground rules for repetition.

A Yes, sir.

Q What do you mean racism issue? What exactly does that mean to you?

A It means that there are a substantial number of voters in Mobile County who will vote for a candidate for that reason, for race alone.

Q In other words, black people vote for a black candidate and white people vote for a white candidate, solely because of race?

A I think that the percentage that will vote for a candidate solely on his race is much higher.

Q You think that white people do that more often than black?

A Yes.

Q Do you have any reason for making that statement?

A Yes. I think Senator Perloff's race was an example. More blacks voted for Senator Perloff than whites did for James Buskey.

Q That is your example? Sometimes the word "racist" is used in this connotation or this sort of discussion, "racist".

A I have heard the word, yes.

Q You are saying that whites are more racist than blacks?

A No, sir. That is not what I am saying, but that

shows - -

THE COURT: Of course, he has a right to testify. If you want to tell him, you have a right to do that.

MR. WOOD: I think that is just totally inaccurate, Your Honor. I am taken by surprise. That is all.

THE COURT: Do you have both population figures and registration figures?

MR. MENEFEE: This is population, Your Honor.

THE COURT: I think, and I will have to speak from the other trial, I think the voter registration is much closer to 50/50.

MR. WOOD: Would you agree to that, Mr. Kennedy?

A Sure, I would agree to that.

Q All right. Now, in that race, in that Buskey - Perloff race, you said that that was an example of where race was used as a factor?

A No, sir. I didn't say that.

Q You didn't say that?

A No, sir.

Q There wasn't any racial campaigning in that particular race then?

A No.

Q Race was not a factor?

A It may have not have been, not to my knowledge.

Q All right. Well, then, that was given by you

as an example of race being a factor in Mobile politics.

A No, sir.

Q That particular race?

A No, sir.

Q You did not use the Buskey - Perloff campaign as an example of race being a factor in Mobile politics?

A I gave an example of race being a factor.

Q You deferentiate between factors and what?

A The question was whether or not it was a racist campaign or not.

Q You concede it was not a racist campaign?

A Not as far as I know.

Q As far as you know it was a straight good clean-cut - -

A Race was a factor, not racists.

Q Whites voted for Mr. Perloff and blacks voted for Mr. Buskey and it divided that way?

A Yes, sir.

Q Now, you gave an example, Wiley - Bridges, or something you considered unfair or racist, didn't you?

A Yes, that was the literature that I had seen.

Q But you don't have that literature?

A No, I don't have it.

Q Do you know who put it out?

A I have no idea.

Q Do you know where it was put out?

A It was put out - - I saw some in the downtown area.

Q Downtown Mobile?

A Right.

Q Who was putting it out?

A It was - - I didn't see people putting it out.

Q What did it say?

A Basically, if I recall, it accused Bridges of catering to blacks and that he had turned loose some Deputies on some white students at Murphy High School several years prior.

Q All right. That was Sheriff Ray Bridges in race for County Commission?

A Right.

Q All right. By the way, Counsel, you explained the outcome of the Perloff - Buskey race on the basis that Perloff was more qualified than Buskey for the position.

A Qualified for what?

Q For State Senator.

A You mean to represent the blacks?

THE COURT: No, to represent the whole county.

MR. WOOD: The most qualified candidate.

A Ask the question again.

MR. WOOD: You said that the race was a factor

in the Buskey - Perloff race, and I suggest to you that couldn't you say that Senator Perloff won, not because of race, but because he was the best qualified candidate?

A No, sir.

Q He was not the most qualified?

A No. The most qualified candidate doesn't always win.

Q You think Buskey was the most qualified candidate?

A No, sir.

Q Senator Perloff served eight years in the Alabama House of Representatives, didn't he?

A That is correct.

Q He was a lawyer, wasn't he?

A That is correct.

Q It does help being a lawyer in the legislature, doesn't it?

A Yes, sir.

Q Mr. Buskey was a school teacher.

A That is correct.

Q Some people could say that the reason Senator Perloff won was because he was the best candidate.

A You could say that. I wouldn't say that. I would say Perloff won because he ran a better campaign.

Q Okay. Then, you discussed about - - you gave us your idea of some of the particularized interests of blacks

A Well, almost always.

Q All right, sir.

THE COURT: All right. Let's take a 15 minute break.

(R E C E S S)

THE COURT: All right. You may proceed.

MR. WOOD: Mr. Kennedy, as a lawyer, you know there is no constitutional right for blacks to be elected to public office, don't you?

A Yes, sir. I have heard that argument.

Q You have heard that argument?

A Yes, sir.

Q Now, what is the Voter Registration Organization?

A This is an organization in Pritchard that attempts to get blacks registered to vote and whites also.

Q It endorses candidates?

A Yes, sir. It endorses candidates.

Q Does it do the same sort of thing as the Non-Partisan Voters League?

A I am not sure. I am not a member of the Non-Partisan Voters League.

Q It endorses candidates in the City of Mobile legislation and county-wide elections, doesn't it?

A Right.

Q And the local branch of the NAACP out in Pritchard endorses candidates, doesn't it?

A I don't believe so.

Q Doesn't it?

A No, sir. I should hope not, no, sir.

Q Do you belong to that?

A No, sir.

Q Now, you don't know of any exclusive white organizations that have that sort of set up like the Voter Registration Organization and the Non-Partisan Voters League?

A If there was a white organization that did that, I wouldn't know.

Q You don't know of one, do you?

A No, sir.

Q All right. Now, do you know Leila G. Brown?

A No, sir.

Q The Plaintiff in this case?

A No, sir.

Q How about Mary Louise Griffin Coley?

A No, sir.

Q How about Joanie Allen Dumas?

A No, sir.

Q Do you know Elmer Joe Dailey Edwards?

A No, sir.

Q How about Rosie Lee Harris?

three.

Q But you knew it in the beginning?

A Yes, sir.

Q But, then, all of a sudden, the second time around, that became a reason you voted against it?

A One of the reasons, yes.

Q And the other two - -

THE COURT: Let's don't go back over them. I have heard them. Well, ask him about them.

MR. PHILIPS: I intend to, Your Honor.

THE COURT: Let's don't ask him to recite them.

MR. PHILIPS: One of the other reasons that you recited was that you had been, and this is the language of your testimony as near as I could get it, that you were led to believe that the Mobile County School Board was created by a constitution amendment and could not be changed by a local act; is that your testimony?

A Yes, sir.

Q Okay. Was the bill you introduced the first time a local act?

A Yes, sir, it sure was.

Q All right. Who led you to believe this?

A After research, I discovered that there was a question as to whether or not it could be done.

Q By local act?

A Yes, sir, but local act.

Q All right. Did someone - - did you discuss this with anybody or did you discover this completely on your own?

A No, sir. Someone else discovered it.

Q Who discovered it, Mr. Kennedy?

A Mr. Dan Alexander. I believe I got that from him.

Q Okay. Mr. Alexander told you that the legislature - -

THE COURT: Is that a member of the School Board you are talking about?

A Yes, sir. I think the information got to me that the School Board was going to attack the bill on that basis; that we couldn't redistrict the Mobile County School System because it was created by a constitutional amendment. That was the basis on which I believe that the bill was going to be attacked initially.

MR. PHILIPS: The bill was going to be attacked. I am talking about the second bill.

Now, are you telling us that the second bill, the School Board told you that they were going to attack the second bill?

A No, sir. The first bill. I got that information from somebody that had to do with the attacking of the

first bill. It was my information that they were going to attack the bill initially, the first bill, on that basis.

Q Because it was being changed by the passage of a local act?

A Yes, sir.

Q Okay. The second bill wasn't a local act, though was it?

A No, sir. It was a local act. It was a general act of local application.

Q There is a difference between a local act and a general act of local application and the second bill was a general act of local application.

A Yes, sir.

Q That was designed to get around the probability of attack because it was a local act.

A I don't know, but it could have been.

Q Okay. Then, the other reason, the third reason that you gave us, you said that there was some technical defect in the bill, or that might have been the same reason we have just been discussing.

A It may have been, but I think the defect was it was a bill based on a population basis, yet, in the body of the bill, it was, of course, formulated on districts.

Q Well, was this a defect that could have been procured by an amendment to the bill?

A I don't believe so, no, sir.

Q You don't think so?

A No, sir.

Q You don't think there was any probability, then, of procuring a legislative act that could be, in proper form, be enacted by the legislature?

A Dealing with - -

Q With the subjects we are talking about.

THE COURT: The School Board.

A I am in doubt as to whether or not - - it is my feeling, as I said, that the legislature, according to the Constitution of the State of Alabama, can not do anything to the Mobile County School Board except by a constitutional amendment.

Q That is your opinion?

A Yes, sir.

Q That is the reason you opposed, then, your second bill?

A One of the reasons.

Q One of the reasons you opposed the second bill?

A Yes.

Q Okay. If the legislature couldn't properly do anything about it by enacting an act, Mr. Kennedy, why was it necessary to oppose enactment?

A I am sorry, sir.

Q Do you deny making it?

THE COURT: He says he doesn't recall. That is it If he doesn't recall, he doesn't recall.

MR. PHILIPS: Your Honor, I have no further questions.

THE COURT: Mr. Blacksher?

MR. BLACKSHER: No further questions.

MR. WOOD: Judge, one question, please.

THE COURT: All right.

RE-CROSS EXAMINATION

BY MR. WOOD:

Q Mr. Kennedy, do I remember correctly, didn't you state that there was no racial campaigning in the Buskey - Perloff Senatorial race?

A I think I stated there were no racists campaigning in the Buskey - Perloff race.

Q There wasn't any racial campaigning in that race, was there?

A I believe I testified there were no racists campaigning. The mere fact that race entered into the thing; Buskey is black and Perloff is white.

Q What I mean is Senator Perloff wasn't going around saying, "don't vote for my opponent because he is black." He wasn't doing anything like that?

A No, sir.

Q And Mr. Buskey didn't have any hand-bills or things saying black people got to stick together and vote against the white man. There wasn't anything like that, was there?

A No, sir.

MR. WOOD: That is all.

THE COURT: All right. You may come down.

Whom will you have next?

MR. BLACKSHER: Your Honor, I apologize to the court. I had misplaced to the court with my introduction statement about Mr. Cooper.

THE COURT: All right.

GARY COOPER

the witness, having first been duly sworn, to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q State your name and address, please, sir.

A Sir, my name is Gary Cooper and my address is 1208 Palmetto Street, Mobile, Alabama.

Q Would you give us a resume of your formal education?

A Yes, sir. I attended grade and high school in Mobile. I have a B.S. Degree of Finance from the University of Notre Dame and studied on the graduate level at the George Washington University in Washington D.C..

Q Were you born and raised in Mobile?

A I was born in Louisiana and came here within the first year of my life and I was raised in Mobile.

Q Are you presently an elected official in the legislature of Alabama?

A Yes, sir, I am.

Q From what district?

A District 103, sir.

Q You were elected in 1974.

A Yes, sir.

Q From a single member district?

A Yes, sir.

Q How long have you been involved actively in Mobile County politics, Mr. Cooper?

A I believe, sir, the first race that I worked in was probably in '69 or '70.

Q Which race was that?

A That was the Jackie Jacobs race for the School Board.

Q That would have been 1970, I believe.

A Probably. I am not sure whether it was '69 or '70.

was a factor?

MR. PHILIPS: Your Honor, excuse me. It seems to me the question, where race was a factor, is a bad question, unless we define it a little closer. What is meant by where race was a factor in the campaign?

THE COURT: You have an opportunity to cross-examine him.

MR. BLACKSHER: Let me withdraw the question.

I will start with the Jackie Jacobs campaign. Will you describe her qualifications for that office?

A As I remember, she was, I think, an instructor at a local junior college and had done a certain amount of work on her Doctorial Degree. She was a very articulate, well-spoken, attractive candidate and probably, in my opinion, more qualified than any one else that has sat on the School Board.

Q In fact, she has earned her Ph.D. since that time.

A Yes, sir.

Q Could you describe how her race specifically became a factor in her campaign for the School Board?

A Yes, sir. In my opinion, from the initiation of the campaign that it was very obvious, because of her appearance, that she was a member of the black race. Because of the fact she had to run in a system that required

at large, and because of the polarization of the vote, she did not receive hardly any of the white vote and consequently lost.

Q Who were her opponents in the May Primary - - strike that - - yes, 1974?

A I remember one opponent as Dr. Norman Berger. I don't remember if there were other opponents.

THE COURT: Is he an M.D. or a Doctor of Philosophy, Dr. Berger.

MR. PHILIPS: Your Honor, he is a dentist.

THE COURT: All right.

MR. BLACKSHER: Mrs. Jacobs was defeated in that campaign, correct?

A Yes, sir.

Q Are you aware of what kind of vote returns she got?

A If I remember, and this is somewhat hazy, I believe she may have barely gotten in the run-off, but she was very soundly defeated in the final election, sir.

Q Was the next campaign you were involved in that of your brother's in 1972 - -

A I believe so, sir.

Q Mr. Cooper, tell us to what extent your brother's race was a factor in his campaign in Pritchard.

A Your question was, in what fact race was a factor

in his campaign?

Q Yes, sir.

A It was the most important factor, because of the fact he had to run at large, and because of the prior administration and the political set up, 99.9% of the election officials in the City of Pritchard were white.

People were harassed at the polls. They had a difficult time voting and challenging ballots and, at the polling place, where there appears to be a heavy black turn-out, many methods and ways were found to cause delays and so forth.

Q What was the percentage of the registered voters who were black in the City of Pritchard, at the time?

A If I remember, it was - - in the Primary - - I believe it was closer to 50 - 50 or maybe a slightly smaller number of black voters.

Q Did the campaigners make a concerted effort to get more blacks in the City of Pritchard to register to vote?

A Yes, sir, a very concerted effort.

Q Tell us some of the things, some of the ways you encouraged and actually helped black citizens to register to vote prior to the election?

A We had a strong voter registration drive in which we literally used young people and old people alike and

knocked on doors and arranged transportation to pick people up and actually carry them down to the Mobile County Courthouse to get them registered. We did this as long as we could prior to election day.

Q Did you have any difficulties getting these black voters registered? Did you encounter any impediments or barriers there at the Courthouse?

A Yes, sir. At that time, the Board of Registrars were somewhat hostile to our efforts, and people had to wait in long lines and they made it more difficult than it could have been.

Q What efforts did the campaigners make to get the vote out, to get the vote out particularly in the black community of Pritchard?

A Yes, sir. We encouraged the ministers in the community to make announcements after their church services We knocked on doors in the early mornings. We put campaign material, you know, on the front porches. We provided transportation and, prior to election day, we had motorcades and used the normal, you know, procedure to encourage people and get them excited about an election.

Q Did the returns show that you were successful in turning out a large portion of the black voters in Pritchard?

A Yes, sir, a reasonably large vote.

Q And your brother was successful in that race?

A Yes, sir.

Q And was elected Mayor of Pritchard?

A Yes, sir.

Q And recently re-elected?

A Yes, sir.

Q Were you involved, in any way, in his most recent campaign, 1976?

A Only in a minimal amount, sir.

Q Were you close enough to it to tell us whether the percentage of black registered voters has changed since the '72 campaign in Pritchard?

A Yes, sir. It has increased somewhat.

Q Do you have any estimate to the degree to which it has changed?

A I am not certain as an exact figure, but I would say maybe 2 to 3%. Certainly, no more.

THE COURT: In other words, blacks have a slight majority now?

A I would think possibly, sir.

MR. BLACKSHER: With respect to the white candidates that - - whose campaigns you were involved in, would you tell us whether or not they sought the vote of the black community throughout Mobile County or throughout the City of Mobile?

A Yes, sir, they did.

Q Tell us how they went about seeking the vote of the black community.

A They went about it normally by contacting individuals in the community that they thought were influential and attempted to get their help in getting other people to vote for them.

Q Were there certain things that the campaign strategists avoided doing to make known to the white community the attempts of these candidates to seek actively the black vote?

A Yes, sir.

Q Would you describe what they were?

A I think one obvious thing is that in most of the campaigns they did not publicize or publish the fact that they had, in fact, active campaigns going in the black community.

Q Why was that?

A Well, because in the community in which we live, there is still a great deal of racism, and they, I think, very accurately analyzed that if the white community knew that they were catering to the black vote they would lose a great deal of the white vote.

Q Some people in this courtroom, Mr. Cooper, have suggested that things have changed since 1970 and the late 1960's, and that race in the electorate is not the factor

that it was during the 60's any more. What is your opinion about that?

A I think they are gravely misinformed, sir.

Q Can you support that with - - what is the reasoning for your opinion?

A I think that we only need to look at election results and the methods in which people conduct their campaigns.

Q How do you mean?

A Well, let's take the Mayor's race in Pritchard and we look at the results. From Eight Mile, which is a section that is predominantly white, and I believe in that section, Mayor Cooper received approximately 85 votes and his opponent received 800, something like 10 to 1.

Q Mr. Turner?

A Yes, sir. I think that if we looked at other races we will, you know, see clearly that that is the case in other races too.

Q In fact, it was the case in your race against Mrs. Edington for the House Seat in 1974.

A Yes, sir.

Q There was a highly polarized vote in that race as well.

A Yes, sir.

Q You and Mrs. Edington, by the way, made a very

conscious effort not to make race an issue in the campaign.

A That is right. We did, sir.

Q Do you consider there are particular issues that concern the black community with respect to politics in particular, that particularly concern the black community as opposed to the white community?

A Absolutely, sir.

Q Tell us what they are.

A I think the issues that would particularly concern the black community are those of the service that are provided by our municipal and county government, the reaction of School Boards to schools that are located in the predominantly minority community.

I think the fact that we have an inordinate amount of job discrimination in our fire department, our police department, in all areas of our municipal and county services. These are items that would predominantly concern the minority community.

Q What kind of discrimination are you talking about in the fire department?

A Well, I think they combat fires, but the type discrimination I am speaking of is that currently the fire department has employed 490 people. Of these individuals 97% of them are white.

A recent check with the Personnel Boards tells

me that a minority has not been hired in the Mobile Fire Department since November 16 of 1971.

MR. PHILIPS: Excuse me, if I might interrupt briefly, and object to this line of questioning. This is purely a municipal matter. The city fire department has no relationship to the School Board or the County Commission, and I don't think this testimony as any place in this proceeding.

THE COURT: I think it is relevant as to the white power structure in reference to black needs.

Go ahead. The City of Mobile is part of Mobile County.

MR. BLACKSHER: Mr. Cooper, do you get complaints from your constituents with respect to matters of School Board concern?

A Yes, sir, very frequently.

Q Do these complaints come from black citizens throughout Mobile County, not just in your district?

A Yes, sir.

Q Could you tell us about some of them?

A Yes, sir.

Q The nature of some of them?

A I think a perfect example might be a school by the name of Dunbar, that is located in my district.

Q That is a middle school?

A That is a middle school.

Q One hundred percent black enrollment?

A Yes, sir.

Q All right.

A If we drove by Dunbar today, as I just drove by, you would find the grass approximately three feet high. If you walk in the auditorium, there are no curtains in the auditorium. If you walk through the hall, you find the walls chipping and breaking, and it is very evident that few visit - - I have always been out to speak at a class. Maybe Scarborough; is that the name of the school here?

MR. BLACKSHER: Yes.

A I have been maybe to that school or to another school, and there is a very visible difference in the type maintenance in the schools.

Q Scarborough is a predominantly white school?

A Yes.

Q In a white neighborhood?

A Yes. If you look at the gounds upkeep, it is very evident. I would also venture to submit that the few times that I have visited Barton Academy, and I look at the racial balance of the people who are employed at Barton Academy, you would almost think they lived in an all white community.

Q Have you received complaints from teachers?

A Yes, sir.

Q Would you describe what they are?

A Well, I think my predominant complaint - - I get many calls from many teachers who tell me they must travel to Demopolis, Alabama and to Florida and other places to teach school when they are familiar with white citizens getting jobs who have applied after they have applied.

Q When you get these kinds of complaints, how do you deal with them, if at all?

A Normally I call - - is it Dr. Le Destro, and prior to that, Dr. Collins.

Q The Superintendant of Schools?

A And I discuss it with them.

Q What kind of problems come to you as a black representative that are of concern to the Mobile County Commission?

A I am trying to think of those specifically. I think one very evident one is the fact that the Mobile County Commission played a very big part as being the prime sponsors of the Ceta Consortium, which was set up under the Comprehensive Employment and Training Act in which there was a tremendous amount of discriminatory practices going on and I, on many occasions, spoke with Commissioner Yeager and Commissioner Cory Smith about these discriminatory practices and in each case to no avail.

Q You are going to have to tell us what you mean by discriminatory practices?

A Funding programs that directly effect an minority community. Hiring individuals of their choice rather than the best qualified individual.

Q Who might be black?

A Who happened to be black.

Q Since you have been in the legislature, Mr. Cooper, have you seen any evidence that black and white legislators are consciously aware of the fact that the at large election system in Mobile County has on the ability of blacks to get elected?

A Yes, sir.

Q Could you tell us what you have observed that leads you to that opinion?

A Well, I think, first of all, the fact that we have been elected and we are there and the fact that our vote can have some influence on what goes on, you know, in our local community.

Q You mean you were elected from a single member district?

A Yes, sir.

Q You introduced, didn't you, a bill to modify the Mobile County Personnel Board; is that correct?

A Yes, sir.

MR. PHILIPS: I still would like to make my objection.

THE COURT: Your motion is denied.

MR. BLACKSHER: Mr. Cooper, since you have been in the legislature, have you been able to observe whether or not the members of the Mobile County delegation in the legislature are aware of the effect the at large system for County Commission and the School Board has on the voting strength of blacks in this community?

A Yes, sir, I have.

MR. WOOD: Your Honor, I object to that question This calls for expert testimony that this witness is not qualified to give.

MR. BLACKSHER: Your Honor - -

THE COURT: Go ahead.

MR. BLACKSHER: Your Honor, I am asking this legislator for his perception and the perception of his co-legislators concerning what effect the at large system has. I want to know what is in their mind and what they discuss. This goes simply to the question of intent that is raised by the Defendants in this matter. Is the legislature aware of the effect of the at large system which it has maintained on the voting strength of blacks in this community.

MR. WOOD: Judge, I object on the grounds of

heresay.

MR. PHILIPS: Your Honor, he is asking the witness to testify to the mental operation that is in the minds of other witnesses not before the court.

MR. BLACKSHER: Your Honor, I am simply asking for this legislator to relate what he has heard, what conversations he has engaged in, not necessarily for the purpose of revealing the truth, but for the purpose of simply revealing that they were made.

THE COURT: Overruled and let the answer in.

MR. BLACKSHER: Do you understand the question?

THE COURT: Read it back to him, Mr. Reporter.

(Whereupon, the last question was read by the Court Reporter.)

A Yes, sir, I am. There is little doubt in my mind, or there is absolutely no doubt that each member of our delegation is aware of the effect of the at large system and the reason I am so sure of this is, whenever we discuss the writing, or the drafting of a piece of legislation that will, in fact, break down Mobile County into single member districts, there are many questions that other legislators ask about how many blacks will this result in and should there be a drawing that will result in more than one, or more than two. The reaction

comes out relatively negative. So, they are, in fact, aware.

MR. WOOD: Your Honor, I would like to call the court's attention that Dr. Cotrell is sitting in the courtroom. As I understand it, we had designated our expert to sit with us.

THE COURT: Yes. Where is Dr. Cotrell. Step outside, please, sir.

MR. BLACKSHER: We apologize, Your Honor. You may continue, Mr. Cooper, if you weren't already through with your answer.

A I think that was basically my answer.

Q What bill in particular have come up since you have been in the legislature that would have provided single member districts in the county?

A Well, the one that immediately comes to mind, of course, was the bill we originally passed re-districting the Mobile County School Board.

Q That was in 1975?

A Yes, sir.

Q Was there also a bill to re-district the Mobile County Commission in 1975 that did not succeed?

MR. KENNAMER: I object. He is leading him. He could ask him if a bill came up. He makes a statement that such a bill came up and then said didn't it.

THE COURT: Yes. Rephrase your question.

MR. BLACKSHER: Yes, sir. Was there another bill concerning the Mobile County Commission?

A I believe so, sir.

Q What about in the most recent session of the legislature, the 1976 session?

A The only one I remember is the School Board.

Q Who introduced that bill?

A Representative Cain Kennedy.

Q I am talking about in the 1976 legislative session, the one most recently ended.

A I remember there were two bills introduced in relation to the School Board. Representative Kennedy introduced the first and, the second one, Representative Sonnier introduced it. I believe Sonnier's was in the '76 session and Kennedy's in the prior session.

Q Do you recall how you voted with respect to Representative Sonnier's bill in the House?

A If I remember correctly, we did not have an opportunity to vote on that bill.

Q What is your best recollection of what happened to that bill in the House?

A As I recollect, Representative Sonnier indicated that he desired to introduce the bill, and he consulted with Representative Kennedy and myself, and we indicated

that we would, in fact, protest the bill or contest the bill and that, in fact, would have kept it from passing.

THE COURT: I am not sure I understood what you said. You said you would contest the bill?

A Yes, sir.

THE COURT: You would oppose it?

A Yes, sir.

MR. BLACKSHER: You don't recall if the bill came up for a vote of some kind within your committee or delegation?

A I don't think so, sir, because it was, if I remember, introduced first and - - I am trying to - - I must admit I don't recollect the exact steps that it went.

I do know that Representative Sonnier consulted with me and I indicated I would not support the bill.

Q Do you recall why you were opposed to the bill?

A Yes, sir. First of all, we passed a bill once before that said almost exactly the same thing. That, in my opinion, had been legally advertised and had been opposed and killed, as I understand it, through efforts of the Mobile County School Board.

Okay. It had been advertised. So, the bill that Representative Sonnier, at the request of the Mobile County School Board, all of a sudden one day presented to us was a bill that was so designed, if I remember correctly, to be

a general bill of local application which meant that it did not have to be advertised. I felt, first of all, that the bill should be advertised before we acted on it after the one was previously defeated.

We did not have enough time left in the legislative session for the bill to be advertised, and I also felt that it was a ploy being used by the Mobile County School Board so that they could come back and tell the Judge here in Mobile that we were trying to get a bill passed. Of course, we know that if the bill passed the House, no one knew what would happen to it in the Senate, and if the Senate passed the bill, it could be challenged, and it could mean another two or three years before any result could come of this problem. Those were the reasons I was opposed to it, sir.

Q Mr. Cooper, so long as the Mobile County Commission and the Mobile County School Board are elected at large in the county, would you consider offering yourself as a candidate for either of those bodies?

A No, sir.

Q Tell the court why not.

A I think, that being a member of a minority race, that it would be almost impossible for me to raise the large amount of sums necessary to run an at large race, and I think, because of the racism composition of our total popu-

lation here in Mobile County, that it would be impossible for me to garner the number of votes to win, even if I could raise the money.

Q Finally, Mr. Cooper, I believe Friday you were talking briefly about your participation in Mayor Cooper's, your brother's, 1972 campaign for Mayor of Pritchard, and you were telling us about some of the difficulties that you and other campaign workers encountered at the Courthouse attempting to have black citizens of Pritchard registered.

Did you also encounter some difficulties on election day at the polling place in Pritchard?

A Yes, sir.

Q Would you describe them, please?

A Yes, sir. I was the chief poll watcher for my brother's campaign on election day at Pritchard City Hall where the election boxes were located. Before we went to the polls to work that day, we had a number of classes, and we, of course, were briefed on what the current election law was and we ran - - well, throughout the day, we ran into what we considered to be violations of the law.

If not overt, there were those that were very devious, such as excessive delays to allow people to vote their challenging vote, assisting people when there were a large number of blacks standing in line, individuals would go out and call the whites out of line and lead them to the back of the

polling places where they could vote and leave, and it was so obvious on that election day in Pritchard, sir.

Q What about the challenge ballots. What difficulties did you have with the black voters who sought to cast challenge ballots?

A The system that was used, when an individual came up to vote, they had to fill out a challenge ballot certification, and someone had to vouch that they, in fact, knew an individual and knew that individual lived at a certain address, and should there be an individual who may have lived in a community and who knew three or four people, the election officials at that election would only let you vouch for one person. So, that created a great deal of delay.

Then, there was - - there were only - - the number of people working at the challenge voters table were only two, regardless of how long the line got. When there got to be six hundred people in line, there were still just two people there handling them, and it took an excessive amount of time.

MR. BLACKSHER: No further questions.

THE COURT: You may cross-examine him.

CROSS-EXAMINATION

BY MR. KENNAMER:

Q Mr. Cooper, how old are you?

before she and Senator Edington married?

A Only when I read her resume in the newspaper, sir.

Q Now, when you - - did anybody else run in that campaign besides you and Mrs. Edington?

A No, sir.

Q Was race a factor in that campaign?

A Yes, sir.

Q Who made it a factor?

A I think probably the racist social system under which we have lived for years.

Q You made it a factor too, didn't you, Mr. Cooper?

A By being black, sir.

Q You know that 65% of that district is black or was black in 1974.

A I think population wise that is probably correct, sir.

Q And you got the message over to them that you were a black and that blacks should support the black, didn't you, Mr. Cooper?

A If that message was gotten over, it was not intentionally gotten over by me, sir.

Q Did you run any pictures on posters or in the newspaper or anything showing pictures of you and your family?

A I remember running a picture of myself on posters.

ation?

A I received dual support with my opponent. Both of us were endorsed.

Q Did you receive endorsement and support of the Teamsters Union?

A Yes, sir.

Q Did you consider that support important?

A Not necessarily, in my district, sir.

Q Did you receive the endorsement and support of the Non-Partisan Voters League?

A Yes, sir.

Q Did you consider that support important?

A Reasonably, sir.

Q Did you receive endorsement of the Mobile Press Register?

A Yes, sir.

Q Did you consider that endorsement important?

A That is questionable, sir.

Q Now, asking you a question again about these bills that Mr. Kennedy and Mr. Sonnier introduced, was the Kennedy bill a local bill?

A As I remember, it was a local bill, sir.

Q All right. You do understand the significance between the - - and the difference between local bills, and general bills, and general bills of local application.

don't you?

A Yes, sir.

Q Was the Sonnier bill drawn as a local bill or was it a general bill with local application?

A As I remember, it was a general bill of local application, as drawn.

Q All right. Now, the constitutional prohibition that proved the downfall of the Kennedy bill, or the constitutional requirement of the Alabama Constitution having to do with advertising, which requires advertisement of local bills, that same requirement doesn't apply to general bills, does it?

A Not to my knowledge, sir.

Q All right. Now, in your experience in your work with your brother's campaign for the Mayorship of Pritchard was part of your function to attempt to get people to vote for your brother?

A No, sir.

Q Okay. What was your function in that campaign?

A I worked primarily as a fund raiser and, secondarily, as an individual who worked at the polls on election day.

Q All right. During the course of the campaign, I believe you said you made - - the campaign made extensive efforts to register black people to qualify them to vote.

A Yes, for the government's resolution, change of government resolution.

THE COURT: All right. You used to determine the coefficient, was the "R" square method that you used?

A Yes.

THE COURT: The middle column, was that the vote cast?

A No. That is the income per capita in that ward.

THE COURT: All right. You may come down.

MR. BLACKSHER: It is all right to excuse Doctor Schlichting?

MR. PHILIPS: Yes, sir.

MR. WOOD: Yes.

THE COURT: Call your next witness.

CHARLES L. COTRELL

the witness, having first been duly sworn to tell the truth, the whole truth and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. STILL:

Q Mr. Clerk, would you hand the witness Exhibit No. 60, please?

May it please the court, this is Charles L. Cotrell. He lives at 210 King William Street in San Antonio,

Texas. He is thirty-five years of age.

He received a B.A. and a M.A. at St. Mary's University in Texas. He received his Ph.D. at the University of Arizona.

He is married and has two children. He is an Associate Professor of Political Science at St. Mary's University in San Antonio.

Dr. Cotrell, is that information correct?

A Yes, it is.

Q Would you look, please, at what has been marked as Plaintiff's Exhibit No. 60?

A Yes.

Q Is that a resume?

A Yes, it is.

Q What is the date on that resume?

A This is December, 1975.

Q Is anything significant that has happened in your life to change that resume since that time?

A I have had a birthday.

Q All right. Other than that is the resume substantially correct?

A Yes, it is.

MR. STILL: Your Honor, the resume shows that Doctor Cotrell, as we have pointed out, is an Associate Professor of Political Science and it shows that he has

testified as an expert in voting cases in Texas, Louisiana and we move his admission as an expert witness for the purposes of political science and analysis of voting behavior.

THE COURT: All right.

MR. STILL: I would like to move the introduction of Exhibit No. 60, which is his resume.

THE COURT: All right.

(Plaintiff's Exhibit No. 60 was received and marked, in evidence.)

MR. STILL: Now, Doctor Cotrell, in your role as an expert for the Plaintiffs in this case, what sort of background work have you done in the Mobile area to prepare for your testimony today?

A I have examined the regression analyses that were talked about earlier in this courtroom. I have interviewed some twenty or more politically active individuals, office holders, non-office holders, candidates, also rans and just generally politically knowledgeable people.

I have read the depositions in this case. I have sat through and taken part in the city portion of this case and I have also examined the raw vote totals presented to me.

Q Did you also examine the computer print-outs, the

regression analysis?

A Yes. I said that I did.

Q Excuse me. I must have missed that.

Now, what does the term voting dilution mean to you as a political scientist?

A Voting dilution is a phenomenon which usually occurs in an at large election structure wherein an identifiable voting group vote is submerged or cancelled consistently at the hands of a voting majority other than that group. So that that groups vote or their preference, the groups preference, is not registered in the electoral field.

Q All right. Now, what does the term polarized voting mean?

A It is a dynamic in voting behavior wherein, in races, for example, with black and white candidates or between white candidates, one of whom is favored by the black community, a preponderant - - in preponderant number of cases the vote, voting behavior coalesces along racial lines.

Q All right. Now, going back to voting dilution, what data from Mobile did you examine to determine whether or not voting dilution of the black vote in Mobile exists?

A The informational basis for my opinion concerning the racial dilution where the regression analyses, raw vote

totals, interviews with politically active individuals and an analysis of these phenomenon in three different jurisdictions, city, county and school districts.

Q Mr. Clerk, would you hand the witness Plaintiff's Exhibit No. 9?

Doctor Cotrell, Plaintiff's Exhibit No. 9 has been introduced. I believe it is the Voyles thesis and analysis of Mobile voting patterns from 1948 to 1970. Have you read that thesis?

A I have read Doctor Voyles' thesis.

Q Did you consider the information that he had gathered and conclusions that he had gathered in making your decisions about Mobile?

A Yes, I did.

Q All right. Now, on the basis of all of this information that you considered, in your opinion, does there exist in Mobile, in Mobile County, voting dilution of the black vote?

A In which elections?

Q Well, let's take them one at a time.

Let's take the School Board elections first. In terms of School Board elections, does voting dilution exist?

A It is my opinion that racially - - dilution does occur in School Board races. yes.

Q On what do you base that opinion, specifically?

A I base that on the examination of the regression analysis, interview data and some familiarity with the raw vote totals.

Q Now, as far as County Commission elections go, are you able to conclude that voting dilution does exist with respect to County Commission elections?

A It is my opinion that delusion does occur in the County Commission races and has occurred and I base that opinion upon the regression analysis and examination of the raw vote totals and also interview data and the existence of racially polarized voting and dilution in other than County Commission races.

Q Now, what were those other than County Commissior races?

A Well, for example, in the '60's, a person by the name of Montgomery, a black candidate, ran county-wide and was soundly defeated. Also the school district races are county-wide and, of course, the city is subordinate to or is consumed by the county.

Q All right. Now, in terms of political analysis, is it consistent with good political analyses to make those

A An opinion concerning delusion must be reached on the basis of information in the jurisdiction at hand, the county, the city, the school district.

It would be less secure an opinion, for example, about county races exclusively by an examination of school district races, although those races are county-wide. However, I think common sense instructs us that although the issues and candidates are different and the level of office is different, many of the voters are the same in these overlapping jurisdictions and, therefore, delusion and racially polarized voting in one area would, at least, lend suspicion to the existence of dilution in another area.

Q All right. Now, there is some evidence before the court now and some exhibits that I would like to show you. Mr. Clerk, would you hand Exhibits 3 and 4 to the witness, please.

Doctor Cotrell, have you ever looked at those particular exhibits before?

A Yes, I have, during the course of the city case.

Q All right. Now, taken individually, those exhibits show that in certain selected wards which are designated as predominantly black, that there is a lower turn-out of voters than there is among other selected wards which are designated as predominantly white.

A That is correct.

Q Do you have sufficient data to draw a conclusion about the possible reasons for this lower turn-out?

A I can offer an opinion on those reasons. I haven't examined the entire political and legal structures in the history of Alabama nor in Mobile, but, for example, in House District 99, you have.- - well, beginning with School Board race Gill - Alexander run-off, you have a black candidate and a high response, apparently from the predominantly black wards in the turn-out.

One credible view would be that the existence of black candidates does spur turn-out. Another credible view would be that long term exclusion from the political process may, indeed, result in differentials in turn-out among blacks and whites and, indeed, make it more difficult in the long run for black voters as it were to catch up in turn-out.

Q Now, let's turn for a moment to a hypothetical. If I propose to you the theory that the 1960's elections in Mobile County and the City of Mobile may show a polarized vote and a dilution of black votes, but that since about 1970 things have changed dramatically in our society and that there no longer is that type of dilution and polarization; what would be your reaction to that, based on the evidence that you have before you?

A Well, I would disagree with that particular hypothetical or the content of that hypothetical, because there are regressions. Regression analysis demonstrates that

there is racially polarized voting and I think competent racial dilution in the '70's here in Mobile.

Secondly, literature in the field, in this region and nationally, suggests that race is still a very salient feature and influence in voting and as late as 1975, in a work about the South as a region including Alabama, one author, Newman Bartley suggests that race maintains, with what he calls a perverse persistency, so my reaction to the hypothetical that you gave me is that race is and can be a salient influence in Mobile elections.

Q All right. Now, what does the term pivotal vote mean to a political scientist?

A Not boring in on any particular formulation of the pivotal vote theory, I think it could be taken to mean an identifiable voting groups position in the electorate of sufficient number whereby the group can pivot or turn an election around, decide it out, tilt the scales one way or the other.

It is surrounded by numerous assumptions about the behavior and capabilities of that particular group and their place in a general electorate.

Q Are you familiar with the process by which the Declaration of Independence was adopted?

A In what regard?

Q Have you studied that lately?

A Yes.

Q Okay. In that case there was a pivotal vote by one delegate from the state of Pennsylvania, wasn't there, out of three votes?

A That is correct.

Q That caused Pennsylvania to vote for the Declaration of Independence.

A I think that is correct.

Q Now, that is a very small example, one vote out of three, being a pivotal vote.

Are there any particular limits on the size of a pivotal vote?

A Well, your question is very general. In pivotal vote theory you think you are dealing with a group, not three of us in a room, one of whom has the balance of power.

I was describing pivotal view. I wouldn't call it a theory in the context of voting behavior in groups, not as it were a three handed card game.

Q All right. Now . . . . . .

THE COURT: Is pivotal vote to you equated with the commonly used term of swing vote?

A Your Honor, if you mean does one group have the capability, conscious capability, of throwing the election to one candidate or another, yes.

THE COURT: All right.

MR. STILL: Now, Doctor Cotrell, does a pivotal vote have to have voting cohesion among the block that is the pivot or the swing vote?

A Yes. That cohesion would vary. You have to have cohesion, hence the group recognizable and the pivot.

Q Now, you also used the term, in responding to His Honor's question, and I think you called it conscious cohesion or conscious realization or something like that.

What do you mean by that term?

A Well, I think that the voting group, in order to - - according to Harry Holloway, a scholar at the University of Houston - - in order to maximize their position there has to be an awareness that, indeed, this group is, quote, "swinging an election", unquote, or pivoting in a pivoting position and thereby are in a bargaining position in an election.

It wouldn't be clear to say the degree of knowledge throughout the group. It might be leadership. It might be the entire group, but under the pivotal notion does assume some awareness that the group in question is, in fact, swinging the election and then it - - and of course, there is one other consideration in the pivotal vote theory and I think an office holder, an also ran, a candidate, would be the most aware of this consideration and that is

in election after election, does the group have enough votes? If you subtract them or add them to the winner to have made any difference anyway. Now, that seems to be crucial to a pivotal vote view.

Q With particular reference to the County Commission races, did you analyze the data that I supplied you, which we, in turn, got from Jack Friend about the difference between the black wards, predominantly black wards, and the population, at large?

A So that the court is aware, the data, in question I believe, is basically raw vote totals.

Q Right.

A In County Commission races roughly, as I recall, from 1960 - 1972 and I did examine that data.

Q All right. Did you find any instance in which the total black vote for a particular candidate swung an election?

A In the 23 races I examined, including primaries, run-offs and the general elections, I found no instance where, if you subtracted the black vote total in the predominantly black wards, it would have swung an election.

As I recall, there was one very close instance that the black vote in the Friend information varied from 1 to 7 or 8,000 votes and, of course, it was always split among various candidates, but the crucial question is

whether when you subtract that vote total in the election I examined, whether you would have won an election or lost an election because of the black vote.

Q All right. Now, one more factor about pivotal votes.

Is it also necessary if you have any pivotal vote that the other, the non-pivotal people, be fairly evenly divided between the two candidates, the two sides of the referendum issue or whatever it may be?

A Of course. If you merely find that black voters are voting 70% with the winning candidate and the county-wide totals are predominantly white wards are voting 71% with the winning candidate and the winning candidate wins by a 15,000 or 20,000 vote margin, what you have concluded is that black voters voted in that instance like the white voters and I think it is then fair to ask, at that point, so what.

Q Now, on the basis of all the information that you have analyzed, have you found any evidence that black votes are the pivotal vote in Mobile County, Mobile School Board or Mobile City Commission elections?

A In accordance with the data which I have looked at, which I have analyzed, I have not found that to be the case.

Q All right. Now, in your expert opinion, what

will happen to black voting power in the future if we continue to use at large elections for the election of members to the School Board and County Commission of Mobile County?

A It is my opinion that dilution of the black vote will continue.

MR. STILL: That's all the questions I have.

THE COURT: You may cross, Mr. Wood.

CROSS-EXAMINATION

BY MR. WOOD:

Q I believe you stated that if we keep on going like we have been going and the County Commission and School Board elections, at large elections, that the black vote will continue to be diluted; isn't that right?

A That is correct, Counselor.

Q All right. What is your answer for or how would you restructure our election system for say the Sheriff of Mobile County, who runs at large?

A I have no opinion on restructuring the Sheriff's office or the election system underpinning it.

Q All right. The Probate Judge runs at large, the Tax Assessor and Tax Collector. Will people who vote in these elections, the blacks, will their votes be diluted in those cases too?

Q So, you would have to look at the computer print-outs to tell what the predominantly black wards were prior to reapportionment; is that correct?

A I would like to look at the raw vote totals and the computer print-outs and answer that question, yes.

Q Now, the Jack Friend data that you talked about, which was raw vote data on various black wards, I believe.

A Yes.

Q Now, that data didn't necessarily include the total black vote in Mobile County, did it?

A No.

Q As a matter of fact, you can't really tell by looking at the raw vote data on the predominantly black wards whether or not the black vote in those elections was a swing vote or not, can you?

A It comes close to 60% of the total.

Q So, it is 40% in other wards, isn't it?

A That is correct.

Q And it could make a difference in various elections, couldn't it?

A It could.

Q And you don't know whether or not it did, do you?

A The regression anlaysis, however, supports racial polarization.

Q I am not talking about racial polarization.

I am asking you whether or not it is possible or whether or not you have an opinion on whether or not that 40% that is not in those predominantly black wards could have been a swing vote?

A I understand your concern for the limitations of Mr. Friend's data.

Q That is not what I asked you, sir.

I said, can you tell us whether or not the black vote was a swing vote in those elections you saw simply by looking at Mr. Friend's data?

A I can tell you that the predominantly black wards contained in Mr. Friend's data were not swing votes.

Q All right. But if you put them with the other 40% in the other wards they could have been, couldn't they?

A Theoretically or possibly could have been, yes.

Q How much weight did you put on the regression analyses in your analysis of the County Commission situation?

A The racial polarization expressed in the regression analysis was less secure in the county instance than it was in the other two jurisdictions in reaching my opinion.

Q How many County Commission races did you examine in reaching your opinion?

MR. WOOD: So, Doctor Cotrell, the analysis of the elections over the period of time between 15 and 25 years would be the best; isn't that right, be satisfactory?

A Well, in order to establish the existence of a pattern, a longer period of time would be more desirable.

Q Isn't it true that you just analyzed the County Commission elections over a four year period of time from '68 to '72?

A The races examined in the regression analysis, yes. In the raw vote totals, no, and in the interview data, no.

Q All right. Now, what are the criteria you use to reach your conclusion that racial polarization exists in Mobile County? Aren't there three criteria?

A On racial polarization?

Q Yes.

A Well, the regression analyses are their own factual statements. Also the existence of racial campaign data is important and I suppose the perception that racial polarization exists thereby influencing whether or not candidates would offer themselves for office would yet be another important consideration.

Q What did you find on the existence of racial appeals in campaigning in County Commission contests?

A I found in the 1972 race, the Democratic Primary

race between McConnell and Langan, I found the existence of documents that especially attempted to saddle former City Commissioner, Joe Langan, with the block vote.

Q Which is another name for the black vote; is that right?

A Yes.

Q And you found this in ads?

A That is correct.

Q Do you consider that unfair for his opponent to point up that he is getting the black vote?

A In my professional opinion, it is not a question of fairness. It is a question of existence.

Q If Mr. Langan actively sought that vote and secured it, that is a factor you should take into consideration too, isn't it?

A Whether or not it was - - whether or not Langan sought the black vote or whether or not he received it is evidence that, at least, one candidate felt it would behoove him to appeal to racial themes in a recent 1970 election.

Q But you are not saying which candidate it was that did it, are you?

A I am not trying to impute goodness or badness to either Mr. Langan or McConnell, no. It existed. I saw the document, yes.

Q Whether it is an original thought with the interviewee or whether it is a reflection of the thoughts of others with the interviewee as a conduit.

A You try and make determinations like that, yes.

Q Can you make accurate determinations of that nature?

A You can make assessments of each interviewee and what they say and attempt to put together an aggregate or contextual picture that is the basis of a judgment.

Q Doctor, is it your philosophy as in your expert opinion in the field in which you are expert, that black citizens have a constitutional right to a political safe black electorial district that can, in fact, insure the election of black candidates?

A No. It is not my opinion that any group has a constitutional guaranteed right to a so called safe district.

Q Doctor, did you find in the white community anything to approximate the Non-Partisan Voters League Screening Committee for screening political candidates?

A No. I did not.

Q Doctor, can you have a situation where you have delusion in a single member district where you have single member district election systems?

A In the sense that you would have racially polarized voting is a possibility in a single member district. I

THE COURT: I think he means with reference to the racial polarization.

A Right. And my response would be that, in my opinion, the racial polarization still exists in the '70's as it existed in the '60's.

MR. PHILIPS: And the patterns in that respect are essentially the same?

A Well, there is the same kind of evidence available to suggest that it still exists in the '70's.

Q All right. Doctor, did you find that there was racial polarization in any of the School Board races where there was no black candidate running?

A Yes. In the 1972 Jerre Coffler race - - I don't recall the "R" square, but it seems to be high. That race also was accompanied by evidence of racial campaign appeals.

Q Did you find that evidence to follow in any other race?

A Of the races examined?

Q Of the races in which there was not a black candidate.

A The races examined were - - there were five races examined and Coffler and her opponent was the only race wherein two whites ran against each other among those examined.

Q I see. That is the only race you examined then

A It wasn't the next one. It was the next.

Q Why didn't they go to the meeting while you were in the hospital, do you know?

A I don't know.

Q Okay. Now, are you aware of the policy of the Board, Mrs. McArthur, that allows interested citizens and delegations to appear before the Board and address it at any meeting of the Board?

A No, sir.

Q You are not aware of that?

A No.

MR. PHILIPS: I have no further questions, Your Honor.

MR. MENEFEE: No further questions.

ROBERT EDINGTON

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

If it please the court, this is Mr. Robert Edington. He lives at 1220 Selma Street, Mobile. He graduated from Southwestern College in Memphis. He got his Law Degree from the University of Alabama in 1956. He

has been practicing in Mobile since then.

Mr. Edington, were you born and raised in Mobile?

A Yes.

Q How long have you been actively involved, in one way or the other, in the politics of Mobile County?

A The first political campaign I remember going on was with my father in 1938 when he ran for Circuit Judge. Of course, I was just an observer.

In 1958, after finishing law school, I worked on the political campaign of my then partner, Judge Will G. Caffey, in his race for the State Senate.

Q What about yours? I believe you have been elected to the Alabama House of Representatives twice, in 1962 and in 1966, and once to the Senate of the Alabama Legislature in 1970; is that correct?

A That is correct. Of course, I worked, obviously, very hard in each of those campaigns, which were campaigns covering essentially all of Mobile County.

Additionally, I worked on the campaign of Senator Caffey, when he ran for Circuit Judge back in 1962, the same year that I ran first for the State Legislature.

Then, in 1972, I ran state-wide, unsuccessfully, I might add, against Senator John Sparkman for the Democratic nomination of the United States Senate.

In '68 I ran for and was elected to the Democratic

National Convention in Chicago.

Q Okay. Are there any other political campaigns, local political campaigns in Mobile County, that you have been involved with?

A Yes, my wife ran for the State House of Representatives, District 103, in 1974. Then, this year, she ran for the Democratic National Convention from what is essentially the same district, but unsuccessfully.

Q Mr. Edington, in your experience in county-wide politics, is race an issue?

A Well, in every campaign in this county that I have had anything to do with one way or the other, the subject of race comes up. Yes, it is definitely an issue.

Q Would you go so far as to say it was the dominant issue, or would you place another factor above that?

A I would say that it was a persuasive and very important issue. It could be, in any county-wide race, a dominant issue. Quite often it is not, because the candidates themselves and their workers are sufficiently informed, and generally, I suppose you might say, in most cases, not to make it openly a major issue, but it is, without a doubt, a major issue.

Q Well, how does the issue of race come up in these local campaigns?

A Well, there are a number of ways. I would say

many years ago, the late '50's or the early '60's, it is fairly open and that is, if a candidate ran in Mobile County and got solid black support in the Democratic Primary, and remember, at that time, the Republican race really didn't make much difference then, that candidate would have that vote thrown back at him in the case of a run-off, and, in that way, it was an over racial incident. It was perfectly clear to be specific if one got the ward ten vote, which was the Davis Avenue vote, 80 - 90% just solid, then this is going to be used against him and was used against him on many occasions in a run-off.

Q Do you recall a couple of occasions when this was done?

A I can't think of the names specifically of races, but I know from my own knowledge that I have read political ads and seen political hand-bills in this county in the late '50's and early '60's where that was a specific issue, and I do recall one specific race, and that was involving former city commissioner Joe Langan.

Q Which one of Mr. Langan's races are you thinking about?

A I don't recall specifically, but I do know that in one of his races - - of course, he got a heavy vote on Davis Avenue, and an advertisement to that effect was run in the newspaper and hand-bills were put out, yes.

Q Do you recall seeing those advertisements when he was defeated by Mr. Bailey in 1969?

A I dont specifically recall them. I had no reason to particularly notice it.

Q Okay. The implication of your answer is that the issue of race was not brought up so openly any more; is that correct?

A That is correct. It is handled much more subtlely through code words, such as conservative candidate and that sort of thing.

Q It is still there?

A Under the surface it is still there. I think anyone saying differently doesn't know anything about politics in Mobile County.

Q Not every race, in not every race does race surface even subtlely as an issue, I take it.

A That is true. If a white candidate is running against a white candidate, and there is no particular reason to raise the issue, then it is very likely - - quite likely it would not come up, but if a white candidate is running against a black candidate, it would be a very obvious issue. If a white candidate were running against a so-called liberal white candidate, which is a code word in the county for one strongly supportive of black interests, then race would become a very vital issue.

Q In those cases, or in those campaigns where race does become a vital issue, is it necessarily expressed through the ads and speeches of the candidates themselves?

A Generally the candidates of Mobile County, you know, have a fairly sophisticated approach towards elections. Those that have ever been elected either get sophisticated in a hurry or they don't get re-elected. Their workers might put the word out for them in the community or whispered campaigns, surreptitious hand-bills, and conceivably through advertising.

I recall in the Brewer - Wallace race, that is what I would call scurrilous hand-bills had been put out.

MR. WOOD: Your Honor, I object to that. It is not responsive to a question.

THE COURT: All right.

MR. BLACKSHER: Mr. Edington, do I understand you to say anytime a black person runs for office that the race issue is automatically injected into the race?

A Unless there is a situation where there are only two candidates - - well, where all the candidates are black.

Q That hasn't happened except in the recent races out of the single member legislative districts, has it?

A I do not recall any all black race in Mobile County, except in a single member district, yes.

THE COURT: And those districts have a majority black registration.

A To an absolute certainty, those districts have 70 to 80% black registration or black population. I couldn't swear to the registration.

MR. BLACKSHER: Is it considered politically unwise for a white candidate to have black persons displayed prominantly in his campaign organization or among his supporters?

A I would say this. I have never known a white candidate in a county-wide election that had a black campaign political person that appeared at public gatherings or appeared at the campaign meetings. This might be true in state-wide races or national races that this is done, but, in Mobile County races I don't recall ever seeing a campaign chairman or major person in a campaign of a white candidate that was black.

Q Never the less, most white candidates do attempt to get black votes in their campaigns, don't they?

A Obviously they make every effort to get all the votes they can. They do, of course, make a strong overture to the black community, generally the leadership of the black community.

Q Is there a point a which the white candidate, who wants to win a county-wide election, would prefer not

to have so many black votes?

A As I said, my experience in Democratic Primaries back in the late '50's and early '60's was to the effect that heavy support in the black communities that was identifiable, such as what we call ward ten, or the Davis Avenue area, which I would say is almost 99% black, if you've got that vote on the first ballot, then this would be used, and sometimes effectively, against a candidate on a run-off. So, to that extent, one had to be careful in soliciting the black vote, only to get a modest percentage on the first ballot.

Q Now, we have been talking generally about campaigns and elections county-wide. Would you make any distinction with respect to the principles that you have been discussings, depending on whether or not the campaign is for city or - - strike that - - for County Commissioner, or for School Board, or for, in the past, some county-wide legislative race?

A You mean of the methods of approaching the race, the difference in each of those three types of elections?

Q Yes, sir. That is what I was trying to ask.

A Well, in planning a campaign, one would have to use a different strategy in each race. To a large extent, a county commission race is a race for a full-time paid position. It is obvious that it is worth more in the way

of campaign contributions than a part-time job, such as a School Board race or a legislative race.

In fact, the School Board race is a race for a non-paying job, and is thus thought to cost less to run for that on a county-wide basis. Of course, legislative races are no longer county-wide. I am speaking of prior to 1972.

Q Can you give the court any idea of the round figures you are talking about that would be necessary to run a successful campaign for the County Commission and the School Board?

A The County Commission races, and I would have to base this on fairly current figures, would have to cost maybe thirty, forty or fifty thousand dollars at the present time. The School Board race would naturally cost a lot less, because it is for a non-paying job. It is considered more of a civic type job than a full-time job, like County Commissioner, and generally the candidates - it has been my observation - don't spend as much money for those races.

THE COURT: Let me ask you a question. You mentioned legislative races before 1972.

A Yes, sir. I meant before 1974.

THE COURT: Were all House races and Senate races county-wide?

A Yes, sir. All House members and Senators were

elected on county-wide ballots.

THE COURT: Had any black legislator been elected under that system?

A No black legislators elected.

MR. BLACKSHER: There were two who tried right in modern times.

A I can remember a man who now works for the tax assessors office, who runs a barber shop, named Clarence Montgomery. There have been.

Q Was there a Charles Bell that ran the same year that Clarence Montgomery did, right?

A I don't remember him.

Q Do you recall any others?

A There was a man that ran against Sage Lyons. I don't recall his name.

Q Well, now, I believe we can stipulate that Charles Bell, at one time, ran against Sage Lyons in the special election of 1969.

A I don't specifically recall. I do specifically recall Clarence Montgomery.

Q In any event, with respect to the figures that you have mentioned for financing a campaign for County Commissioner, is that the kind of money that any black candidate would be able to raise without some support of the white community -- without some white financial support?

A Let me say this. In the general experience of raising political money, and that is contributions I received in relation, one, to the importance of the office, and conjunctively with this to some extent was the general idea of what the chances are of the candidate to win. And a candidate who has, in essence, no chance and has a very difficult time raising much money than a few dollars from his friends and family.

Q Isn't it conventional wisdom in Mobile that a black candidate running county-wide does not have a good chance of winning?

MR. WOOD: Your Honor, I object to that. That calls for some sort of reputation in the community.

THE COURT: Yes, it does. I will let him answer that.

MR. PHILIPS: I didn't hear the question.

THE COURT: Read the question back to him, Mr. Reporter.

(Whereupon, the last question was read by the Court Reporter.)

MR. PHILIPS: Your Honor, I object to the question. I must confess to a political sophisticate like Mr. Edington, maybe - - conventional wisdom, I don't know what that term means.

A It is my personal opinion that a black candidate

in a county-wide race in Mobile County against a white candidate simply doesn't have any appreciable chance of winning. In fact, I would say no chance.

MR. BLACKSHER: Mr. Edington, you were a member of the Mobile County Legislative Delegation in 1963 and 1964, correct?

A That is correct.

Q As a member of the House of Representatives.

A Right.

Q And it was in 1964 that the Alabama Legislature enacted the pay or council bill that was eventually voted on by the voters of the city of Mobile in 1973; is that correct?

A That is correct.

Q In that bill, did it not provide that the council members, if the referendum had succeeded, would run for single member districts - -

MR. WOOD: Your Honor, I object. It is totally irrelevant to the county case.

MR. BLACKSHER: Your Honor, I think my next question will tie it up.

THE COURT: All right. Go ahead.

MR. BLACKSHER: Was there any discussion among the members of the Mobile County Legislative Delegation, at that time, about the possibility of having the county

members run from single member districts and, if so, what was the reaction of the Mobile County Delegation in respect to the effect it would have on the chances of blacks being elected?

MR. WOOD: Your Honor, I object. It is irrelevant.

THE COURT: I will let him answer.

A First, there was a discussion on the subject. Secondly, it was considered politically suicidal to vote for a bill that would assure to the election of black city officials.

Secondly and secondarily, as you know, this change of government bill had to be voted on about the public and it was generally considered that the public was highly unlikely to vote for a change of government bill that included single member districts, which would, in effect, assure substantial black representation on the city council.

Q The legislators, at that time, were very conscious of the effect of single member districts would have on the election of black candidates.

A Certainly.

Q Was there anything else that happened while you were a member of the Mobile County Legislative Delegation that would indicate the awareness of the legislation of

the effect that the at large - - that the three bodies have on the black vote and the ability of blacks to select their preferences?

A I am afraid I am going to have to ask you to restate your question. I am not quite sure what you mean by the question.

Q Was there anything else that happened while you were in the legislative delegation that indicated an awareness on the part of the legislators that the at large system prevented blacks from being elected?

A I would say any and all local bills to be general, any and all local bills that came up relating to elections, always brought up the subject of what effect is this going to have, in effect, you know, allowing blacks to be elected or keeping blacks from being elected, to be in a negative way. That is the concept of the single member district; always had as an over-riding issue, isn't this going to mean, in effect, guaranteeing black representation or whatever body might be involved. This is, you know, a general factor.

Q Can you give us any statement, Mr. Edington, based on your first-hand experience, about the relative percentage of blacks who were registered to vote during the first half of the '60's when you were engaged in those campaigns before the Voting Rights Act?

September 14, 1976 9:00 A. M.

THE COURT:

All right. Are the Plaintiffs ready?

MR. STILL:

Yes, sir, Your Honor.

THE COURT:

Defendants ready?

MR. KENNAMER:

Yes, Your Honor.

THE COURT:

You may proceed, gentlemen.

ROBERT EDINGTON

the witness, resumes the stand to testify as follows:

CROSS-EXAMINATION

BY MR. WOOD:

Q Senator, would you explain the local courtesy rule as it was used in the State Senate when you were up there?

A You said the State Senate?

Q Yes, sir.

A By special agreement among the three members of the agreement, and I am referring, of course, to the time I was there. I don't know what the rule is now, but, as far as I

know, it has not been changed; by agreement among the three members of the Senate elected from Mobile County. No local bill comes out of the local legislative committee in the Senate without the unanimous approval of all three, or the fact that none objects.

Q And if there is a Senator who objects, who opposes, the bill, he can still let it come out and vote against it.

A He can, and, as a matter of fact, that has been done

Q In fact, when you were in the Senate, bills came out of the local legislative committee and were passed by the Senate and enacted into law, bills that you opposed, but you let come out of the committee; is that correct?

A That is correct.

Q Do you know when that rule first came into effect- - when it was first used?

A Well, upon the reapportionment of the legislature, that was designed, of course, to give urban areas a more fair representation in the State Senate. Mobile County obtained three Senators instead of one and, when those three Senators were elected, it was my understanding that they then adopted that rule.

Q That was in 1966 when that was first adopted, wasn't it?

A Yes.

Q And now, in the House, the House doesn't or didn't

have that rule, did it?

A That is correct. As a matter of fact, quite often local bills would be debated on the floors of the House by members of the Mobile Delegation.

Q That would be a local floor fight right there in the House chambers, wasn't it?

A That is correct.

Q In fact, you and I have been on opposite sides of the microphone in that situation.

A On opposite sides and on the same side from time to time.

Q In the House?

A Correct.

Q Now, when you went to the Senate and you became familiar and started using the Senate local courtesy rule, there would be occasions when legislation that you favored would die because you decided to continue to adhere to that policy, isn't that right?

A I am not sure I really understand the question.

Q What I meant was that there were times - -

THE COURT:

Rather than break the courtesy rule, you would let your deal die.

A That is correct.

MR. WOOD:

of your campaigns, was it?

A In the sense that the candidate raised the issue, no.

Q Isn't it true that almost all candidates for county-wide office that you have known that wanted the vote of the black community?

A Well, basically, anyone running for office wants all the votes he can get.

Q Wouldn't you say the black community here in Mobile County is the most cohesive voting group that we have in this county?

A I would say up until the last probably two years. I don't know that that would be really true right now, but by and large I know of no other group that votes together nearly so much as the black community of this city or this county.

Q While it might not be true today, wouldn't you say the Non-Partisan Voters League was the single most effective endorsing organization in our county?

A In general, yes. Now, on an actual union management question, possibly the Southwest Alabama Labor Council could have similar effect, but, basically, for general issues, the Non Partisan Voters League was the most cohesive and most effective voter organization.

Q And there has never been in Mobile County, as far

as you know, a comparable white organization as effective and as long standing as the Non-Partisan Voters League; is that correct?

A That is correct.

Q By the way, blacks are members of the Mobile County Democratic Executive Committee, aren't they?

A Yes. They are elected from single member districts from various wards, precincts, or however it may be devised at the present time.

Q They have served on the Democratic Committee for many years.

A Since the committee was reorganized subsequent to the election of Bill Taylor to the Circuit Court many years ago.

Q That was done on a local level.

A To the best of my knowledge, it was changed by the rules of the County Executive Committee.

Q The State Legislature didn't dictate that change and the State Democratic Party didn't dictate that change, did they?

A I can say the legislature did not do it. The State Democratic Executive Committee, quite likely had a strong hand in it, but I don't recollect it.

Q Do you consider yourself an expert in Mobile politics and elections?

A I hardly think I am an expert in anything. I have had a lot of experience in it.

Q You have always tried to get the endorsement of the Non-Partisan Voters League.

A To the extent that I appeared before them and presented my position, but I was never endorsed by them.

Q As a matter of fact, you and I have been seen over there at their headquarters.

A I think everybody running for office in Mobile County at one time or another appeared before them and various other groups, yes.

Q And you didn't consider the endorsement of the League as the kiss of death, did you?

A No.

Q As a matter of fact, didn't you get the endorsement of the League the last time you were elected to county-wide office?

A I was co-endorsed along with Mr. Rasey Smith.

Q And that was - -

A Which is no endorsement. When they endorse two people in the same race, it amounts to no endorsement.

Q Didn't it also mean you and Mr. Smith were acceptable to the League and the black community?

A I would think possibly that would be correct.

Q All right, sir. That was in May, 1970.

A Yes.

Q And you got the black vote in that election, didn't you?

A Probably about even. I don't recall the precincts statistics, but it wasn't overwhelming.

Q Well, wouldn't you say that ward ten is a good example of a predominantly black ward in that election?

A It is the traditional baromether, you might say, of the effectiveness of the Non-Partisan Voters League endorsement.

Q And isn't that election in ward ten - - didn't you get 716 votes?

A Of course, I really don't recall what I got. If you have the figures, I am sure that is correct.

Q Yes, sir. I have the figures.

MR. BLACKSHER:

I object, Your Honor. If they are not in evidence, we would like to have them offered in evidence.

THE COURT:

I will let him ask him about them.

MR. WOOD:

Judge, I hate to give up my chat here. Let me let you look at this, Mr. Edington, and look at my totals.

A Right. It would appear from this that Edington received 716 and Rasey Smith, 293.

Q All right, sir.

MR. BLACKSHER:

If the court please, could this be identified for the record, please?

THE COURT:

Yes, mark it for identification.

(Defendant's Exhibit No. 2 was received and marked in evidence.)

MR. BLACKSHER:

Is that a copy of the official returns from the Probate Judge's election?

MR. WOOD:

Yes.

MR. STILL:

For which election?

MR. WOOD:

May Primary of 1970.

MR. BLACKSHER:

No objection.

MR. WOOD:

So, Mr. Edington, although there was a double endorsement in that election, in ward ten, you got 716 votes and Rasey Smith got 293.

A That is correct. It is also important to note that

there was no run-off. So, there was no opportunity to have used it against me in the Democratic Primary.

Q You were real glad to get that vote from that ward, weren't you?

A I certainly was.

Q Now, when you ran against Senator Sparkman, you tried very hard to get the endorsement of the black community here in Mobile County, didn't you?

A Essentially on a statewide basis. My meetings were almost entirely with the State Democratic Committee. The Alabama Democratic Conference is called in Montgomery.

Q In fact, you almost got the endorsement here in Mobile, didn't you?

A I don't see how I could have since Mr. John LeFlore was a candidate in the general election. Now, in the primary, he was not a candidate, to the best of my recollection. So, it might have been possible, but essentially my efforts were statewide, because in a statewide race, you really can't take too much time with one county.

Q Wouldn't you say that you can't fine tune an election so that you could get a good black vote, but not get the black vote?

A It would be extremely difficult.

Q Now, you gave an opinion that a black man -- or a

statement to the effect that a black man couldn't win, in your opinion, in a county wide race, did you not?

A Yes. I think that is absolutely a political fact.

Q One example of that was the Clarence Montgomery race that you were familiar with?

A That was an example, yes.

Q Yes, sir. Now, you knew Judge Grayson, didn't you?

A Very well.

Q He was one of our two Circuit Judges for many years?

A I knew him, you know, as long as I can remember.

Q Wasn't he one of the two Circuit Judges?

A Yes.

Q And the Grayson name and family were well known, weren't they?

A In fact, Billy Grayson's campaign slogan was, "Remember the name" quote, unquote.

Q And Mr. Montgomery and Mr. Grayson ran against each other?

A That is correct.

Q Mr. Grayson was a lawyer and Mr. Montgomery was a barber, and there was a runoff in that election?

A I really don't recall.

Q Mr. Montgomery wasn't nearly as well known as his opponent, wasn't he?

A I would say, in fact, the Grayson name was probably

A They have in the past. That influence is not effective now as it has been.

MR. PHILIPS:

I have no further questions.

REDIRECT EXAMINATION

BY MR. BLACKSHER:

Q Mr. Edington, concerning the endorsement of the Non-Partisan Voters League, which you said most politicians did, at one time or another, seek, isn't it true that merely seeking and obtaining the endorsement is not itself the kiss of death; for one reason, because the ballot only comes out like the night before the election and there is not enough time for your opponents, if you do get the endorsement, to capitalize on it unless there is a runoff?

A If there is no runoff, all the candidates want to get a copy of what is known as the pink sheet, which is the endorsement sheet of the Non-Partisan Voters Leage, as soon as possible. Those who get it, want to know they get it, and those who aren't getting it, want to get copies and spread them out to other areas in Mobile County to use against the candidate that got it.

Q That is why the Non-Partisan Voters League always tries to get it out as late as possible?

A In recent years, it was gotten out almost hours before